

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

Addition to Record by Stipulation of Counsel

**United States Court of Appeals for the
District of Columbia**

No. 6987

181

J. WM. TOMLINSON, ET AL.

v.

UNITED STATES OF AMERICA.

FILED AUGUST 19, 1937

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.**

In the United States Court of Appeals for the District of
Columbia.

No. 6987.

J. WM. TOMLINSON, ET AL.

v.

UNITED STATES OF AMERICA.

Stipulation as to fact not appearing in the record and
assignment of error thereon.

Stipulation.

It is stipulated and agreed between counsel for the appellant, Philip John Pratt and counsel for the United States that on May 24, 1937 immediately before the selection of the jury that counsel for the appellant Pratt and Pratt himself moved the Court for a continuance of this case on the grounds that counsel had had an insufficient time in which to prepare Pratt's defense, that said motion was overruled and an exception noted; and it is further agreed and stipulated that this shall be deemed an additional assignment of error.

This stipulation is entered into this 17th day of August, 1937.

FRANCIS J. KELLY

Attorney for Appellant Pratt

CHARLES B. MURRAY

Asst. U. S. Attorney

F. DICKINSON LETTS

*Associate Justice U. S. District
Court.*

Endorsed: United States Court of Appeals for the District of Columbia Filed Aug 19 1937. Moncure Burke, Clerk.

UNITED STATES
COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED SEP 1937

IN THE
**United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1937

No. 6987

SPECIAL CALENDAR

J. WM. TOMLINSON AND PHILLIP JOHN PRATT,
Appellants,
vs.
UNITED STATES OF AMERICA.

**APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF
COLUMBIA**

**BRIEF ON BEHALF OF APPELLANT
J. WM. TOMLINSON**

JAMES A. O'SHEA,
JOHN H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Appellant.
J. WM. TOMLINSON.

SUBJECT INDEX

	PAGE
STATEMENT OF CASE	1
ASSIGNMENT OF ERRORS	12
ARGUMENT	16
1. The Demurrer and Motion in Arrest of Judgment	16
2. Defect Upon the Face of the Record	20
3. The Withdrawal of Plea	21
4. Smallwood's Testimony	21
5. Restriction of Cross-examination of Bass	22
6. Privilege	22
7. Rebuttal Testimony	28
8. Accomplice Prayer	29
9. Alibi Prayer	31
10. Improper Argument to Jury by District Attorneys	34

CASES CITED

	PAGE
Baumgartner, U. S. vs., (D. C.) 259 F. 722, 723	19
Blackman vs. St., 78 Ga. 592, 596 (3 S. E. 418)	37
Bobbett, St. vs., 228 Mo. 252 (128 S. W. 953)	32
Boone, Hughes vs., 102 N. C. 137, 160, 9 S. E. 286	25
Brown et al., Peoples Bk. vs., (C. C. A. 3) 112 F. 652, 654	24
Bunkley vs. St., 77 Miss. 540, 541 (27 So. 638)	37
Carlson, St. vs., 39 Or. 19, 28, 62 P. 1016	19
Clawans vs. Dist of Col., 81 Adv. Op. 613, 57 Sup. Ct. Rep. 660	22
Cody, Com. vs., 165 Mass. 133, 136, 42 N. E. 575	18
Com. vs. Cody, 165 Mass. 133, 136, 42 N. E. 575	18
Com. vs. Mowry, 11 Allen, (93 Mass.) 20	18
Com., Newman vs., 28 Ky. L. R. 81, 88 S. W. 1089, 1092	36
Com., Parrott vs., 20 Ky. L. R. 761, 47 S. W. 452	36
Copeland vs. U. S., 55 App. D. C. 106, 2 F. (2) 634	35
Counselman vs. Hitchcock, 142 U. S. 547, 563	38
Dist of Col., Clawans v., 81 Adv. Op. 613, 57 Sup. Ct. Rep. 660	22
Egan vs. U. S., 52 App. D. C. 384, 390 (287 F. 958)	29
Elliott vs. U. S., 23 App. D. C. 456, 467	26
Ex parte Maulsby, 13 Md. 625, 639	25
Frisby vs. U. S., 35 App. D. C. 513	35
Fulton vs. U. S., 45 App. D. C. 27	35
Harris vs. U. S., 63 App. D. C. 232, 71 F. (2) 532	35
Hess, P. vs., 40 N. Y. S. 486, 489, 8 App. Div 143	26
Hill vs. Lyon, 27 Mo. 570, 576	26
Hitchcock, Counselman vs., 142 U. S. 547, 563	38
Hughes vs. Boone, 102 N. C. 137, 160, 9 S. E. 286	25
In re Marquez, 3 Cal. (2) 625, 628, 45 P. (2) 342	19
In re Young, 33 Utah 382, 395, 94 Pac. 731	26
Lee vs. U. S., 37 App. D. C. 442	35
Lew Moy vs. U. S., (C. C. A. 9) 237 F. 50	27
Lorenz vs. U. S., 24 App. D. C. 337	35
Lyon, Hill vs., 27 Mo. 570, 576	26
Marquez, In re, 3 Cal. (2) 625, 628, 45 P. (2) 342	19
Maulsby, Ex parte, 13 Md. 625, 639	25
McHenry vs. U. S., 51 App. D. C. 119	35

	PAGE
Mendelson vs. U. S., 61 App. D. C. 127, 58 F. (2) 532	35
Mowry, Com. vs., 11 Allen (93 Mass.) 20	18
Newman vs. Com., 28 Ky. L. R. 81, 88 S. W. 1089, 1092	36
Parrott vs. Com., (20 Ky. L. R. 761) 47 S. W. 452	36
People vs. Hess, 40 N. Y. S. 486, 489, 8 App. Div. 143	26
People, Waters vs., 172 Ill. 367 (50 N. E. 148)	31
Peoples Bk. vs. Brown et al., (C. C. A. 3) 112 F. 652, 654	24
Price vs. U. S., 14 App. D. C. 391	35
Russell Co. vs. U. S., 261 U. S. 514, 520	19
Sacks vs. U. S., 41 App. D. C. 34	35
St., Blackman vs., 78 Ga. 592, 596 (3 S. E. 418)	37
St., Bunkley vs., 77 Miss. 540, 541 (27 So. 638)	37
St. vs. Bobbett, 228 Mo. 252 (128 S. W. 953)	32
St. vs. Carlson, 39 Or. 19, 28, 62 P. 1016	19
St., Swilley vs., 73 Tex. Cr. R. 619, 166 S. W. 733	35
Swilley vs. St., 73 Tex. Cr. R. 619, 166 S. W. 733	35
U. S. vs. Baumgartner (D. C.), 259 F. 722, 723	19
U. S., Copeland vs., 55 App. D. C. 106, 2 F. (2) 634	35
U. S., Egan vs., 52 App. D. C. 384, 390 (287 F. 958)	29
U. S., Elliott vs., 23 App. D. C. 456, 467	26
U. S., Frisby vs., 35 App. D. C. 513	35
U. S., Fulton vs., 45 App. D. C. 27	35
U. S., Harris vs., 63 App. D. C. 232, 71 F. (2) 532	35
U. S., Lee vs., 37 App. D. C. 442	35
U. S., Lew Moy vs., (C. C. A. 9) 237 F. 50	27
U. S., Lorenz vs., 24 App. D. C. 337	35
U. S., McHenry vs., 51 App. D. C. 119	35
U. S., Mendelson vs., 61 App. D. C. 127, 58 F. (2) 532	35
U. S., Price vs., 14 App. D. C. 391	35
U. S., Russell Co. vs., 261 U. S. 514, 520	19
U. S., Sacks vs., 41 App. D. C. 34	35
U. S., Weitzell vs., 246 U. S. 533, 540, 543	19
U. S., Ziang Sung Wan vs., 266 U. S. 1	24
Waters vs. P., 172 Ill. 367 (50 N. E. 148)	31
Weizell, U. S. vs., 246 U. S. 533, 540, 543	19
Young, In re, 33 Utah 382, 395, 94 Pac. 731	26
Ziang Sung Wan vs. U. S., 266 U. S. 1	24

IN THE
**United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1937

No. 6987

SPECIAL CALENDAR

J. WM. TOMLINSON AND PHILLIP JOHN PRATT,
Appellants,

vs.

UNITED STATES OF AMERICA.

**APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF
COLUMBIA**

**BRIEF ON BEHALF OF APPELLANT
J. WM. TOMLINSON**

STATEMENT OF CASE

J. Wm. Tomlinson, appellant, a member of the Bar of the District of Columbia since 1922, convicted in the District Court of the United States for the District of Columbia of the robbery of Samuel Saritanos, proprietor of a cleaning and dyeing establishment located at 3003 14th Street, Northwest, in the City of Washington, District of Columbia, was sentenced on June 9, 1937, to 3 to 10 years imprisonment.

Charles Henry Bass and Phillip John Pratt were jointly indicted with your appellant. Bass entered

a plea of guilty in the presence of a jury impaneled to try the case and your appellant and Pratt stood trial.

The testimony of two colored men, Walter Leonard Smallwood and Charles Henry Bass, both under conviction, tended to show that Tomlinson was not actually present at the time of the alleged offense on August 18, 1936, but aided and abetted in its commission.

It was the theory of the defense that the witness Smallwood became disgruntled with Tomlinson because he would not help Bass when Bass was arrested in connection with this crime, and these two colored men, with ample opportunity, made up the story to convict Tomlinson.

THE EVIDENCE

Bass became first acquainted with Tomlinson July 15, 1936, about 9:30 A. M., and Tomlinson, after talking to Bass and Pratt on Eye Street for a while, drove them to 14th and Columbia Road, Northwest, and drove them back to Eye Street, Northeast. (R. 18-25)

On July 16, 1936, in the morning, Tomlinson gave Bass a suit of clothes to have pressed and drove Bass and Pratt up to 14th Street for that purpose, and Tomlinson and Pratt waited on Sherman Avenue, Northwest, while Bass had the suit pressed; that then Tomlinson drove them back to Eye Street, Northeast, and Bass got out of the car about 10:00 A. M. (R. 19)

Bass testified the suit was taken there July 15th or 16th, or it could have been the 17th. (R. 25)

That a day or two later (July 18th or 19th) Tomlinson came back and Bass said he did not want to go through with the proposition as it was liable to cause him some trouble. Tomlinson told Bass not to worry

as he would take care of him in some shape or form and told witness, "How would you like to have your wife sitting down comfortably and having no worries?" and that if he stuck with Tomlinson he would have the witness independent. (R. 19) That Bass next saw Tomlinson on the 17th day of August, 1936, at 6:00 A. M., and Tomlinson told Bass everything was set, that the car would be furnished and the guns and everything, and that he was to meet Pratt by 7:00 A. M. and be up there between 7:30 and 8:00 A. M. (R. 27)

Pratt had told Bass about Tomlinson before he had met Tomlinson; that Bass and Pratt had discussed the holdup of this tailor shop before Bass had met Tomlinson. (R. 23)

Tomlinson gave Bass a gray suit to take to 14th Street to have a knee fixed and the suit cleaned, three days before the holdup. (R. 21 & 25)

That everything he did was under Tomlinson's directions. Bass took two suits up there, one to have pressed, so he could see the bulge in Saritanos' pocket and the next suit Tomlinson told him to leave and have the knee fixed to establish an alibi. Bass took the first suit there on or about July 15th or 16th and he did not go back until August 18th or a day or two before and left this suit to be fixed and cleaned.

Bass came out of the tailor shop after the holdup and ran down Columbia Road to Georgia Avenue and went to North Capitol and Eye Streets, Northeast, in a cab where he met Smallwood and got 30 cents to pay the cab man. Bass went on home where he met Pratt's brother, and when he went to Pratt's house (44 Eye Street, Northeast), Tomlinson and Pratt had split the money three ways and Tomlinson handed the witness \$260.00. (R. 20)

That nobody promised witness probation. The first

time he talked to the District Attorney about this case was the morning that he began testifying and he never talked to the police or Mr. Sam Beach or Mr. Charles Murray after he went to jail on August 31, 1936. (R. 26)

That witness was convicted of petit larceny in 1919 in Chicago, Illinois. (R. 21)

CONTRADICTIONS

The Government impeached Bass by the next witness, *Smallwood*.

(Re-direct examination of Smallwood, by Mr. Beach)

That the witness did talk to Mr. Beach in the presence of Mr. Murray and 2 marshals, in Mr. Beach's office and the witness Bass was also present. (R. 38)

Samuel Saritanos (followed Bass on the stand): That he lives at 3003 14th Street, Northwest, where he is in the dry cleaning business and was robbed on August 18, 1936. (R. 27)

That Saritanos identified Bass; that Bass first came to his place of business five times the second week, he came Monday or Tuesday and had his suit pressed and waited until it was finished; that he came back the next Monday and gave me a gray suit to be cleaned and pressed and came back the next morning and asked if the suit was ready and said he would see me in two or three days and on August 18th at 7:30 to 8:30 A. M. he came back. (R. 28)

That witness saw Bass 5 times the first week and 3 times the second week and it was the second week that he was robbed. Bass had been coming there two weeks; that from the 9th to the 15th of August he came 5 times, each time bringing a suit with him; that the second week he came 3 times, witness being robbed on the third time. That Saritanos said that Bass always came about 7:30 in the morning. (R. 29)

Dorsey K. Offutt (Bass's own lawyer impeaches him):

That on October 8, 1936, Bass stated to the witness that he did not make a statement to the police until Inspector Thompson and Captain Keck had promised him probation and told Bass that they would see that he got probation if he made the statement; that the witness reduced the statement to writing and had refreshed his recollection from that paper writing. (R. 55)

Sgt. Frank O. Brass:

Witness said that when Tomlinson was confronted with Bass the first time in Captain Keck's office at Headquarters the day of Tomlinson's arrest, Tomlinson said he had never seen Bass before in his life; that he said he had never seen him before in his life and he didn't know the man and asked who he was and where he lived. (R 44)

Mrs. David Edgar Stephan:

That witness lives at the Fairfax Hotel where she is manager and runs duplicate bridge games. Witness testified that Mr. Tomlinson has attended her Wednesday morning sessions at 10:15 A. M. regularly for the past 3 or 4 years. (July 15, 1936, was on a Wednesday). (R. 78)

"Traffic Regulation 13394, Ticket No. 19, dated July 16, 1936, time 8:30 A. M., to be in court July 17, 1936, 9:00 A. M. H. A. Bowen." (R. 56)

Charles H. Driscoll, clerk of Police Court:

Witness produced a paper filed in Police Court, an information filed in Police Court against Mr. Tomlinson of 4108 Military Road, Northwest, notifying him to appear in Police Court at 9:00 A. M. July 17th and that Mr. Tomlinson did appear and entered a plea

of not guilty and there was a judgment of not guilty and defendant was discharged. The information was sworn to by Officer J. K. Bowen. (R. 59)

Mrs. Josephine B. Tomlinson:

Witness testified she is the wife of defendant Tomlinson, that they were married in 1919 and they live at 4108 Military Road, Northwest; that witness remembers particularly the dates of July 15th, 16th and 17th. On July 16th, about 8:30 A. M., they were stopped by Policeman Bowen for speeding. On July 17, 1936, they went to Traffic Court at about 9:00 A. M. and remained there until noon. (R. 56)

That on August 18th, her husband took her to work, leaving home about 8:00 A. M.; that she was going to look for a coat that afternoon and she wanted her husband to meet her that afternoon at Woodward & Lothrop's; that witness keeps a diary and she has refreshed her recollection as to August 18th and that is how she knows about the coat; that it was her custom to leave home in the morning at about 8:15 A. M., and Mr. Tomlinson would take her to the office; that she would miss no days unless she was on leave, which was very seldom. (R. 56)

That the diary has never been kept at any place except her home and office and that she probably made the entries of the 18th at the office the following day. (R. 57)

Witness remembers on August 18th that she got to her office about 9:00 A. M. and that she saw Mr. Tomlinson again that day in the evening after work at Woodward & Lothrop's. That Mr. Tomlinson went to work with her every morning with rare exceptions, missing about 6 in a year. (R. 57)

Miss Jane Woodfield:

That during August, 1936, witness worked for Mrs.

Gentry at the Woodward Building; that she recalls one morning in August when Mr. Tomlinson came to the office around 9:00 A. M., Mrs. Gentry was not there and witness is pretty sure that she called Mrs. Gentry about 9:30 A. M.; that Mr. Tomlinson remained in the office about three-quarters of an hour and witness thinks that Mr. Tomlinson got Mrs. Gentry to notarize a paper; that witness identified Mrs. S. A. Gentry's signature on the paper, that the paper says the 18th of August there, that is all she knows about it; that from December to August she saw Mr. Tomlinson come in there every once in a while, 3 or 4 times, and since she has been summoned here she recalls his name. (R. 47)

Mrs. Sadie A. Gentry:

That witness has known Mr. Tomlinson since 1917; that in August, 1936, she had in her employ Jane Woodfield; that witness took an acknowledgment on August 18th, 1936, for Mr. Tomlinson; that she arrived at the office between 9:30 and 10:15 A. M. and he remained about 20 minutes after her arrival. (R. 70) Witness identified Mr. Tomlinson's and her signatures on Exhibit 1; that on the 18th of August, 1936, the witness put "18" on the bottom of the paper where it says "Subscribed and sworn to before me this 18th day of August, 1936." (R. 71) That witness was home on August 17th, and about 10:00 or 10:30 A. M., she received a telephone call from Miss Woodfield saying, "Mr. Tomlinson is waiting in the office for some work"; that witness said, "I have been trying to get the office to say if we were not too busy, my sister visiting me, I would like to go on an outing with her today." That witness could hear the voices when Mr. Tomlinson was talking with Miss Woodfield because the telephone was open; that she could not hear Mr. Tomlinson distinctly but she could hear the word "tomorrow." That Miss

Woodfield said, "It is all right. He will be in tomorrow. He is here now." (R. 73)

James M. Ryan:

That witness is an insurance adjuster with Nichols Company and has known Mr. Tomlinson since July, 1936; that between August 15th and 19th he talked with Mr. Tomlinson in his office. (R. 81)

Wm. Hayes Hargrave:

That witness is an insurance adjuster with Nichols Company in the Woodward Building and has known Mr. Tomlinson about 10 years. Witness produced a file of Wm. O. Howard referring to a collision between Howard's Car and Roland Christian's car on May 14, 1936. Witness remembers Mr. Tomlinson talking to him about the Howard-Christian case. (R. 68) That Mr. Tomlinson represented Christian or Pratt. The first time witness saw Mr. Tomlinson in connection with the Howard file was on May 16, 1936, and there was no settlement made in that case. That witness had a note in another file, the Hebron file, under date of August 19, 1936, "Ryan file. Tell Tomlinson to get after this fellow too—Traction Company." (R. 82) That this memorandum was for Mr. Ryan. Tomlinson saw witness sometime before August 19th and as a result he wrote the memorandum to Mr. Ryan. Witness does not recall if he saw Mr. Tomlinson on August 16, 17, or 18, but he did see him sometime before the 19th of August. (R. 83) (Note: 16th was Sunday; 19th, Wednesday. Bridge at the Fairfax Hotel every Wednesday at 10:15 A. M. (R. 78) That on a day about that time, several of them went up the street together about noon, Mr. Tomlinson, Mr. Ryan, Mr. Green and myself (Hargrave), we went to lunch, but Mr. Tomlinson did not join them. (R. 82).

Mrs. David Edgar Stephan:

That witness produced some records from her duplicate games of contract bridge. That on August 18, 1936, Mr. Tomlinson played bridge, 26 boards were played which took probably from 1:15 to 5:15 P. M. Records produced were for Tuesday games for a series of 4 months, and were saved at Mr. Tomlinson's request. (R. 78)

Phillip John Pratt:

That witness is a defendant in this case; that witness knows Mr. Tomlinson as being employed by Mr. Falk and witness worked for Falk, a bootlegger; that witness saw Mr. Tomlinson other than seeing him with Mr. Falk. Witness called Mr. Tomlinson in May, 1936, because his car was in an accident and Mr. Tomlinson came down to his house, 44 Eye Street, Northeast, at that time and again 8 or 9 days later about the same accident. Witness saw Mr. Tomlinson the third time about his brother Maurice being arrested. Witness saw Tomlinson once after that in reference to his cases. Mr. Tomlinson was in a hurry and I got into his automobile and rode over to the Court of Appeals with him; that this was some time around the first week in August. (R. 60) That witness knows Charles Henry Bass and Smallwood and was never present at any conversations between himself, Smallwood, Bass and Tomlinson and never saw Tomlinson talking to Smallwood or Bass. (R. 61) That the title to Pratt's car was in the name of Roland Christian. (R. 66)

Defendant Tomlinson:

That witness was born in Fayetteville, North Carolina, October 27, 1893, and came to Washington, D. C., in 1917 and was admitted to the Bar in 1922; that witness first knew Pratt in the fall of 1935 and repre-

sented Pratt and his family at various times professionally. On the morning of July 16, 1936, while driving his wife to her office, witness was arrested for speeding; that on July 17th he was in Police Court from 9:00 A. M. until 11:30 A. M.

That witness never saw Bass in his life until Bass was arrested; that he never gave Bass a suit of clothes; that he never had a conversation with Bass about 3003 14th Street, Northwest, or Saritanos.

That witness in May, 1936, went to Pratt's house about recovering property damage for Pratt's car which was in the name of Roland Christian and went to No. 2 Precinct and a few days later went to Nichols Company to endeavor to recover the property damage.

That in the month of June he went to Eye Street and advised Pratt that there was no insurance on the Howard car. That witness again went to Pratt's house around May 20th, after Pratt had called him, and saw Pratt's mother about her son, Morris Pratt, being arrested. Upon leaving Eye Street, he went to No. 1 Precinct and then to Headquarters about Morris Pratt, later returning to Eye Street and told Phil Pratt what witness had done. (R. 84)

That witness met Smallwood one time when he was brought into the witness' office by a client and witness was asked to represent Smallwood if he ever got into trouble and he gave Smallwood one of his cards. That witness said that he never took Smallwood or Pratt in an automobile around 14th Street at or near 3003 14th Street, nor had any conversation with them concerning holding up that place; that the witness never had a conversation with Bass or Pratt in which he suggested that they hold up 3003 14th Street, Northwest; that witness never gave Bass any clothes to be pressed there; that witness never knew the man who

was robbed or where the place was located. (R. 85)

That the next time witness saw Pratt was August 7th; that Pratt telephoned witness in the morning about his car being in another accident and said that it was in connection with a client that you represent; that witness on that day rode Pratt to the Court of Appeals in his car so that he could tell him about the accident and after returning to Eye Street, witness saw the damaged car. (R. 87)

That witness next saw Pratt when the defendants were called to plead in this case. (R. 87)

On August 17th, witness went to see Mr. Ryan, who was not in, and then he went to Mrs. Gentry's office, which is a few doors away; that witness always gives his stenographic work to Mrs. Gentry and whenever he could do her a favor he would; that Mrs. Gentry was not in and Miss Woodfield called her home and found out she would be in the next day and witness said he would come back in the morning; that witness went from there to the Congressional Library where he worked all afternoon and met his wife at 4:15 and went home where he remained the rest of the day; that witness did not go down on Eye Street that evening or night. (R. 87)

That on August 18th, witness took his wife to her office between 8:40 and 9:00 A. M.; that he went to Mrs. Gentry's office and Miss Woodfield was there and Mrs. Gentry came in about 10:15 A. M., and witness acknowledged Exhibit 1 before Mrs. Gentry; that then witness went into Mr. Nichol's office to see Mr. Ryan and talked to Mr. Hargrave concerning an insurance matter and talked to Mr. Ryan when he came in about 11:45; that Mr. Hargrave introduced witness to a man named Mr. Greene and they walked out of the office together; that witness then went to the Fairfax Hotel,

ate lunch and played bridge from 1:15 P. M. to around 5:30 P. M. and met his wife at Woodward & Lothrop's, went home where they remained the rest of the day. (R. 87)

That witness never saw Government Exhibit 1, a suit of clothes nor the blackjack nor the revolver; that he did not receive any money on Eye Street in the presence of Pratt and Bass nor did he see any money on a table, nor did he see Pratt or Bass get any; that he never furnished or drank liquor with Bass, Pratt or Smallwood; that he was never present when Bass and Pratt shared any money, nor did witness ever get any. (R. 88)

Officer Thorman, Met. Police Dept.:

Witness produced records from No. 2 Precinct in substance as follows:

May 14, 1936, an automobile operated by Morris Pratt and owned by Roland Christian was in a collision at 3rd and O St., N. W., with an automobile owned and operated by William Howard. (R. 67)

By consent of counsel it is stipulated that there is an entry in the Police Department under date of May 22, 1936, showing that Maurice Pratt, 44 Eye St., N. E., investigation arresting officer, complainant, J. F. Flaherty, et al. (R. 83)

ASSIGNMENT OF ERRORS

The Court erred:

1. In overruling the demurrer on behalf of the defendant Tomlinson.
2. In permitting the defendant Bass to change his plea from that of not guilty to guilty in the presence of the jury.

3. In refusing to permit counsel for defendant Tomlinson to cross-examine the witness Bass fully.

4. In refusing to withdraw a juror and continue the case after the witness De Genaro testified that on October 1st he had his automobile stolen in the neighborhood of 45 H Street, N. E.

5. In permitting the witness Smallwood to testify in the presence of the jury that during the months of April and May he met the defendant Tomlinson and they talked over the question of robbing premises 3003 14th Street, N. W.

6. In permitting the witness Smallwood to testify that he accompanied Pratt and Tomlinson on an automobile ride between the months of May and April, 1936, wherein they planned to rob premises 3003 14th Street, N. W., the ground of the objection being that it was testimony tending to prove a separate and distinct offense.

7. In permitting the witness Smallwood to testify as to conversation he had with defendant Tomlinson in the month of May, 1936, with respect to the premises 3003 14th Street, N. W.

8. In permitting the witness Smallwood to testify that he had a conversation with the defendant Tomlinson, in which he stated that he did not want to participate in the robbery of the premises 3003 14th Street, N. W.

9. In forcing counsel repeatedly to make objections and take exceptions in the presence of the jury to the testimony of Smallwood.

10. In permitting the witness Smallwood to testify that he had a conversation with Pratt and Tomlinson on 1st Street, between H and I Streets.

11. In requiring the witness Tomlinson to testify as

to the name of a client who brought Smallwood to his office.

12. In refusing to exclude the jury from the court room during the discussion as to whether or not the witness Tomlinson should be required to give the name of a client.

13. In requiring the witness Tomlinson to divulge the name of his client.

14. In forcing Tomlinson to disclose the relations between himself, his client and Smallwood.

15. In requiring the witness Tomlinson to state what a client's business was.

16. In overruling the motion to withdraw a juror and continue the case for the misconduct of the Assistant U. S. Attorney.

17. In requiring the witness Tomlinson to tell what his business was with Pratt.

18. In permitting the Assistant U. S. Attorney, Mr. Beach, to comment upon the failure of the witness Tomlinson to bring a certain client into the case.

19. In permitting the Assistant U. S. Attorney, Mr. Beach to comment and argue upon the failure of the witness Tomlinson to appear before the Grand Jury and in refusing to withdraw a juror and continue the case because of such comment and argument.

20. In permitting the Assistant U. S. Attorney, Mr. Murray to comment and argue on the failure of the defendant Tomlinson to testify before the grand jury and in refusing to withdraw a juror and continue the case because of such comment and argument.

21. In permitting the Assistant U. S. Attorney, Mr. Murray, to comment upon Tomlinson's representation of Pratt's brother.

22. In permitting the witness Brass, in rebuttal, to

testify to reading portions of a statement in the presence of Tomlinson.

23. In refusing to strike the rebuttal testimony of the witness Thompson.

24. In permitting the witness Keck, in rebuttal, to testify that a part of a statement was read in the presence of Tomlinson.

25. In permitting the witness Keck, in rebuttal, to testify that he had not promised the witness Bass probation or leniency.

26. In permitting the witness Christian, in rebuttal, to testify about seeing the defendant Tomlinson and Pratt on the day of the alleged robbery.

27. In refusing to strike the rebuttal testimony of the witness Christian.

28. In refusing to strike the rebuttal testimony of the witness Duryee.

29. In refusing defendant Tomlinson's prayer No. 1.

30. In refusing defendant Tomlinson's prayer No. 6.

31. In refusing defendant Tomlinson's prayer No. 8.

32. In refusing defendant Tomlinson's prayer No. 13.

33. In refusing defendant Tomlinson's prayer No. 14.

34. In refusing defendant Tomlinson's prayer No. 15.

35. In refusing defendant Tomlinson's prayer No. 16.

36. In refusing defendant Tomlinson's prayer No. 18.

37. In refusing defendant Tomlinson's prayer No. 22.

38. In refusing defendant Tomlinson's prayer No. 23.

39. In refusing defendant Tomlinson's prayer No. 24.

40. In refusing defendant Pratt's prayer No. 2.

41. In refusing defendant Pratt's prayer No. 5.

42. In denying defendant Tomlinson's motion in arrest of judgment.

43. In denying defendant Tomlinson's motion for a new trial.

ARGUMENT**The Demurrer and Motion in Arrest of Judgment**

The indictment in this case reads as follows :

**DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA**

HOLDING A CRIMINAL TERM

July Term, A.D. 1936

DISTRICT OF COLUMBIA, SS:

THE GRAND JURORS of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one J. Wm. Tomlinson, one Phillip John Pratt, and one Charles Henry Bass, hereafter in this indictment designated and called the defendants, each late of the District of Columbia aforesaid, on, to wit, the eighteenth day of August, 1936, and at the District of Columbia aforesaid, by force and violence, and against resistance, and by putting in fear, and by sudden and stealthy seizure and snatching, feloniously did steal, take and carry away, from and off the person, and from the immediate, actual possession of one Samuel Saritanos, then and there being, seven hundred and eighty-five dollars in money, of the value of seven hundred and eighty-five dollars, of the goods, chattels, money and property of the said Samuel Saritanos; said defendants being then and there armed with a certain pistol held in the hand of the said Phillip John Pratt: against the form of the statute in such case made and provided, and against the peace and Government of the United States.

Attorney of the United States
in and For the District of Columbia.

DEMURRER

Reading of the above shows Appellant was indicted for violation of Tit. 6, Secs. 116a, 116b, of the D. C. Code. Sec. 116a provides:

“ ‘Crime of violence’, as used in this act, means any of the following crimes, or an attempt to commit any of the same, namely: Murder, manslaughter, rape, mayhem, maliciously disfiguring another, abduction, kidnaping, burglary, house-breaking, larceny, any assault with intent to kill, commit rape, or robbery, assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment in the penitentiary.”

Sec. 116b provides:

If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years; upon a second conviction for a crime of violence so committed, he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than ten years; upon a third conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than fifteen years; upon a fourth or subsequent conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for an additional period of not more than thirty years.”

The demurrer to this indictment (R. 6) specifically urged that there was a misjoinder of offenses and no offense charged against appellant.

Exclusive of the words beginning on line 2, R. 6, "said defendants", and including all the words down to the semi-colon in line 4, the indictment charged the offense of robbery (D. C. Code, Tit. 6, Sec. 26). By the addition of those words, the indictment attempted to charge an offense as defined in Sec. 116b, *supra*.

The indictment was framed so as to charge an offense against Secs. 116a and 116b thereunder.

Com. v. Cody, 165 Mass. 133, 136, 42 N.E. 575.

Secs. 116a, 116b establish a crime distinct from the offense of robbery as defined in Sec. 34.

In *Com. v. Mowry*, 11 Allen (93 Mass.) 20, the defendant was indicted under the following statute:

"Whoever assaults another, and feloniously robs, steals and takes from his person money or other property which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent if resisted to kill or maim the person robbed; or being so armed wounds or strikes the person robbed; shall be punished by imprisonment in the state prison for life."

In speaking of the effect of the statute the Court said, p. 22:

"* * * The gist of the crime is in committing a robbery while armed with a dangerous weapon, and in striking and wounding the party robbed, by whatever means the blows or wounds may be inflicted. The purpose of the statute is clear. The legislature intended that the actual commission of violence by striking or wounding, by a person in possession of a dangerous weapon, should be

regarded as a great aggravation of the crime of robbery. The statute therefore puts a robbery so committed on the same footing with one where the robber is armed with a dangerous weapon and actually intends to kill or maim the person attacked, if resisted. The reason is obvious. A wound or blow upon the person, however inflicted, would naturally lead to resistance and conflict, in which the use of the dangerous weapon with which the robber was armed would be likely to follow, with consequences as serious and dangerous to life and limb as if the robber had originally intended to kill or maim the party robbed, if resistance was offered. The striking and wounding are therefore deemed equivalent to the existence of actual intent to do great bodily harm."

To same effect: *St. v. Carlson*, 39 Or. 19, 28, 62 P. 1016;

In re *Marquez*, 3 Cal. (2) 625, 628, 45 P. (2) 342.

Consequently, we have an indictment drawn under Secs. 116a and 116b. But a reading of these sections discloses that the offense of robbery while armed is not mentioned, although the statute does include within the term "'crime of violence' * * * any assault with intent to * * * commit * * * robbery".

The doctrine of *noscitur a sociis* establishes that argument. *Russell Co. v. U. S.* 261 U. S. 514, 250 U. S. v. *Baumgartner*. (D. C.) 259 F. 722, 723 et seq. Nor can the court extend the statute to include robbery because it thinks the statute should have been made more comprehensive. The failure of Congress to include the offense of robbery is *casus omissus*. *U. S. v. Weitzell*, 246 U. S. 533, 540, 543.

Each of these crimes should have been contained in separate and distinct counts.

The indictment charges Pratt with a *crime of violence*

by robbery by being armed with a pistol in violation of Section 116a, 116b. And the same indictment charges the defendants Bass and Tomlinson with robbery in violation of Section 810 of the Code.

The Act of July 8, 1932, provides:

“If any person shall commit a crime of violence in the D. C. when armed with or having readily available any pistol or other firearm * * * .”

This necessitates the physical presence of Tomlinson at the scene of the crime.

The D. C. Code, Sec. 908, provides that in prosecutions for any criminal offense, any person advising, inciting or conniving at the offense or aiding or abetting shall be charged as principals.

Tomlinson cannot be charged as a principal in the crime provided in the Act of July 8, 1932, defining a crime of violence, as this Act was passed subsequent to the D. C. Code and makes no provision for aiding and abetting said crime of violence, as provided in said Act of July 8, 1932.

Defect Upon the Face of the Record

1. The indictment charges an alleged crime of violence by robbery under the Act of July 8, 1932.

2. The alleged proof is that of robbery under Section 810, D. C. Code.

3. The charge of the Court was as to robbery under Section 810 of the D. C. Code and not the crime alleged in the indictment under the act of July 8, 1932.

The offense charged is a crime of violence by robbery under the Act of July 8, 1932, and defendant Tomlinson's prayer pertaining to his actual presence at the scene of the crime should have been granted.

Withdrawal of Plea

Assignment of Error 2.

R. 18: In the presence of the jury, Bass was permitted to change his plea after the Government had made its opening statement, and the trial justice referred his case to the Probation Officer.

By this reference to the Probation Office, an impression could easily be created that the prisoner was a first offender or had a previous record so trivial as to be immaterial and that this testimony against your appellant was entitled to great weight.

The witness Smallwood and Bass had talked to Mr. Beach and Mr. Murray.

Smallwood's Testimony

Walter Leonard Smallwood testified (R. 35):

"That then and thereupon, over the objection and exception of counsel for both Tomlinson and Pratt, the witness Smallwood testified that he had been to 3003 14th Street sometime between May and April; that he went there with Tomlinson and Pratt in Tomlinson's green Ford V-8; that he doesn't know the exact time but it was sometime in the afternoon."

That then and thereupon the witness Smallwood was permitted to go into detail as to certain conversations with Tomlinson about this matter.

If this testimony was admissible on the theory of criminal intent, the jury should have been so instructed. This was not done, although seasonable objection was made.

There is nothing in the record that Saritanos was in Washington in April or May, 1936, that in the summer of 1936 he kept money in his pocket, nor any evidence that he had money in April or May, 1936. There

is no evidence that there was a tailor shop there in April or May. Smallwood never identified Saritanos at the trial and there is no evidence he was ever shown to Smallwood by Tomlinson.

Bass left after the holdup and went in a cab to Eye Street and North Capitol Street, where he met Smallwood and got 30 cents from him to pay the cab man and then went to Smallwood's house, where he met Pratt's brother.

By the introduction of this evidence, the Government was permitted great latitude and subjected Tomlinson to a cross-examination which brought before the jury extraneous matters and opened the door to confidential communications and relations between Smallwood and Tomlinson in other respects.

Restriction of Cross-Examination of Bass

Counsel for appellant Tomlinson was not permitted to cross-examine Charles Henry Bass with that latitude permitted under the circumstances (R. 23). *Clawans v. Dist. of Columbia*, 81 Adv. Op. 613, 57 Sup. Ct. Rep. 660.

PRIVILEGE

Tomlinson was forced by the Trial Justice to testify as to certain privileged communications between himself and his client (R. 89, et seq.). When first asked concerning that, defendant claimed his privilege as a lawyer and asked that the jury be excluded while the admissibility of the evidence be determined. This the Court refused to do and defendant excepted. The matter arose as follows: (R. 89)

“That he had a telephone conversation with Smallwood on Thursday night, the 20th at about

7 o'clock; that he had previously given his card to Smallwood some time in January of 1936; that this occurred in Tomlinson's office;

(Mr. Beach):

"Q. And he was brought in there, as I understand it, by a client of yours?"

"A. (Mr. Tomlinson) That is right, sir."

"Q. Who was the client?" "A. I don't—I refuse to answer about my clients."

"Mr. Beach: I think I have a right to know who brought this man Smallwood to his office, if the Court please."

"The Court: He may answer."

"Mr. O'Shea: May the jury step out for a couple of minutes, if the Court please, so we can get this matter straightened out?"

"The Court: No, I don't think that is necessary."

"The Witness: If your Honor please, being a member of this bar, I don't think I am called on to answer any client's name—"

"The Court: Yes, you made your objection."

"The Witness:—that I have had."

"Mr. O'Shea: May we reserve the exception to his inquiry on that?"

"The Court: Yes."

"By Mr. Beach:

"Q. Who was your client?" "A. Falke, F-a-l-k-e."

A reading of the record on pages 90 and 91 will disclose how injuriously appellant was affected by this disclosure of confidential communications between himself and his client.

It will be remembered that this was elicited from him in cross-examination, when he was examined about his relations with Smallwood.

The general rule concerning this procedure is stated in 28 R. C. L. 569:

“* * * And whether a communication is privileged is for the Court to decide after being apprised through preliminary inquiry of the characterizing circumstances. * * *”

In 5 Wigmore, Sec. 2322, we find:

“The claim of privilege being made, the *trial judge determines* whether the facts justify the allowance of the claim. This follows from the general principle of the judicial function (post, Sec. 2550).”

In Section 2550 there referred to, we find:

“The admissibility of a given piece of evidence is for the judge to determine. This general principle is not disputed; its application to the various kinds of evidence—qualifications of witnesses, absence of a hearsay deponent, voluntariness of a confession, condition of a dying declarant and so on—has already been considered under the various heads of evidence. It follows that, so far as the admissibility in law depends on some incidental question of fact—the absence of a deponent from the jurisdiction, the use of threats to obtain a confession, the sanity of a witness, and the like—this also is for the judge to determine, before he admits the evidence to the jury.”

The rule being the same in cases of privilege as in cases of confessions, it was the duty of the court, therefore, to exclude the jury and determine the admissibility of the communication.

Ziang Sung Wan v. U. S., 266 U. S. 1.

In Peoples Bk. v. Brown et al., (C. C. A. 3), 112 F. 652, 654, the Court, after stating the rule respecting the general rule respecting privilege of attorneys, said:

“* * * Therefore, it is requisite that in every instance it shall be judicially determined whether the particular communication in question be really privileged, and, in order that such primary determination may be advisably made, it is indispensable that the court shall be apprised, through preliminary inquiry, of the characterizing circumstances.”

In reversing the case, the court announced the procedure to be followed by the lower court when the attorney refused to answer on the ground of privilege (p. 655):

“* * * on declination of the witness to testify upon the ground that the matter or matters sought to be discovered came to his knowledge in professional confidence, he is, by way of preliminary investigation, to be subjected to such interrogation as may be necessary to enable the court to determine for itself whether the communication referred to be, under the circumstances, a privileged one, and thereupon to make such order as may be proper.”

In *Ex Parte Maulsby*, 13 Md. 625, 639, the court stated the duty of an attorney who claimed privilege to be as follows:

“* * * His duty is to submit the question to the Court, upon whom the law has cast the duty of deciding it.”

In *Hughes v. Boone*, 102 N. C. 137, 160, 9 S. E. 286, the Court said:

“* * * It is for the Court to determine whether, under the circumstances, the communication is privileged or not, and in order to do so it is com-

petent for the Court to make the preliminary inquiry.”

See also: *P. v. Hess*, 40 N. Y. S. 486, 489, 8 App. Div. 143; *Hill v. Lyon*, 27 Mo. 570, 576; *In re Young*, 33 Utah 382, 395, 94 Pac. 731.

Undoubtedly, it was error for the court to compel Tomlinson to give the name and occupation of his client.

In *Elliott v. U. S.*, 23 App. D. C. 456, 467, the Court said:

“The appellant is an attorney at law, and a member of the bar of the Supreme Court of the District of Columbia. In taking the memoranda for the preparation of the will of the party whose name he refused to disclose, he was certainly acting in his character of attorney, and the relation of client and attorney existed, if his statement be truthful. Was he bound to disclose the name of his client, under the circumstances related by him? The law upon this subject is well settled, and admits of no question or doubt.

“Professional communications, made by client to an attorney, or communications passing between client and attorney, are, upon principles of public policy, and from the necessity of preserving confidence in all matters of business where the assistance or agency of an attorney is required held to be privileged from disclosure; and this privilege embraces all communications made by the client to his attorney for and in course of the business for which the attorney may be employed. The latter cannot be permitted to disclose such communications, whether they be in the form of title deeds, wills, documents, or other papers delivered or statements made to him, or of letters, entries, or statements, written or made by him in that capacity. *Herring v. Clobery*, 1 Phill. Ch. 91, 96, 11

L. J. Ch. N. S. 149; *Cromack v. Heathcote*, 2 Brod. & B. 4, 4 J. B. Moore, 357, 22 Revised Rep. 638; *Greenough v. Gaskell*, 1 Myl. & K. 101, *Coop. v. Brougham*, 96. The protection is not qualified by any reference to proceedings pending or in contemplation, nor is it material that the client be in no manner before the court where disclosure is sought to be had.

“‘If, touching matters that come within the ordinary scope of professional employment, they (legal advisers) receive a communication in their professional capacity, either from a client, or on his account and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness.’ 1 Greenl. Ev. 12th ed. Secs. 236-244; 1 Taylor, Ev. 6th ed. pp. 812-816; and the cases cited by the authors.

“‘It is true, the strict enforcement of the rule may, in some cases, operate to the exclusion of truth; but that does not justify the breaking down of a great principle of protection founded in wisdom and public policy, and necessary to be observed in the administration of an enlightened system of jurisprudence. Like all other general principles, it may, in some instances, fail to accomplish the ends for which it was established. The privilege of the witness or his client, however, does not preclude the adverse party from resorting to any and all legitimate methods of proof to reach the facts desired to have disclosed.’”

See also: *Lew Moy v. U. S.* (C. C. A. 9) 237 F. 50.

It follows that when Tomlinson was erroneously com-

pelled to name the client and disclose the latter's occupation and business, then Tomlinson was most seriously prejudiced. The jury was not entitled to be advised of any of those facts, but having been advised of them, who can say the amount of damage Tomlinson's case suffered thereby? Be the damage large or small, it was in the case by reason of the error of the trial court and what persuasive effect it had on the jury it is impossible to say.

Such being the case, we submit that the case should be reversed for trial before another jury.

REBUTTAL TESTIMONY

Appellant, on cross-examination, stated that while he was in custody no statements were read to him by anybody concerning a robbery at 3003 14th Street, Northwest, and that the first he knew of this crime was when it was presented to the Grand Jury. The rebuttal testimony was directed to August 29, and was not proper.

Bass testified that nobody promised him any probation. (Rec. 26)

For the defense Dorsey K. Offutt testified for the purpose of impeaching the witness Bass.

Bass told Offut in October, 1936, that he did not make a statement to the Police until Inspector Thompson and Captain Keck had promised him probation and they would see that he got probation if he made the statement. (Rec. 35)

As rebuttal testimony the Government produced Inspector Thompson and Captain Keck, both of whom testified that neither promised probation to Charles Henry Bass. (Rec. 94, 95).

How can this be rebuttal testimony? Bass may have told Offutt that he (Bass) was promised probation.

Captain Keck stated to witness Tomlinson, "This man (Bass) has made some very serious charges against you", and Tomlinson said, "What are they?" Captain Keck said, "I can't tell you." Tomlinson said, "Well now, I think I am entitled to know what charges, if someone has preferred a charge against me." Captain Keck said, "No, we can't tell you." We are going to hold you for investigation." (Sunday, August 23. (Rec. 85)

(Captain Keck) That he was present when Sgt. Brass read from a statement of one of the defendants which mentioned the specific robbery at 3003 14th Street, N. W., and the date of the robbery, and the defendant Tomlinson was present and he told Tomlinson what the latter was being held for. (Rec. 94)

(Sgt. Brass) That he read portions of a statement concerning a robbery at 3003 14th Street, N. W., in the presence of J. William Tomlinson on August 29th. (Rec. 94)

ACCOMPLICE

The defendant Tomlinson requested the court to charge that the witness Smallwood was an accomplice. The court refused and exception was noted (R. 114).

In *Egan v. U. S.*, 52 App. D. C. 384, 390 (287 F. 958), the Court said:

"We have no legislative definition of an accomplice. Section 908 of the District of Columbia Code provides:

" 'In prosecutions for any criminal offense, all

persons advising, inciting or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories.'

"This, however, does not fully meet the case. or is section 332, Penal Code U. S. (Comp. St. Sec. 10506), providing that 'whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal,' conclusive on this point. The broader and more comprehensive rule is that any one knowingly and voluntarily co-operating with, aiding, assisting, advising, or encouraging another in the commission of a crime is an accomplice; and this is true, regardless of the degree of his guilt. 1 Russell's Crimes, 49; Wharton's Criminal Evidence, 440; Rice's Criminal Evidence, Sec. 319; Bishop's Criminal Procedure, Sec. 1159."

Under that definition, Smallwood was an accomplice and the requested instruction should have been given.

Smallwood said he accompanied Tomlinson and took part in the agreement to rob Saratonis. That, under the Egan Case, makes him an accomplice. For, as stated in the Egan Case (p. 391), liability to indictment is not the test of who is and who is not an accomplice.

The court, at p. 392 of the Egan Case, said further:

"While there is no absolute rule of law preventing convictions on the testimony of accomplices, if juries believe them (1 Bishop's Cr. Procedure (2d Ed.) Sec. 1081), it is undoubtedly the better practice, and the one followed in this District, to call the attention of the jury to the danger of convicting without supporting or corroborating evidence (*Freed v. United States*, 49 App. D. C. 392, 266 Fed. 1012)."

ALIBI

Defendant Tomlinson offered an alibi as to his alleged dealings with the witnesses Bass and Smallwood, both in the form of witnesses and documents.

Prayers 22, 23 and 24 were requests for instructions on alibi. These the court refused and Tomlinson excepted.

The court did charge on alibi as to Pratt (R. 122), but as to Tomlinson, gave no charge whatsoever on alibi, although that was the only defense offered. The jury was not told of the effect of alibi evidence. They were without any guidance either as to the character of this evidence or its sufficiency as a defense.

The rule as to instructions on alibi is so universally the same it needs no citation. It is—When the defendant's evidence tends to prove a alibi, a judgment of conviction must be reversed for failure to instruct on alibi.

(There are innumerable cases to be found where the defendant was a principal, but the cases on the alibi of an aider or abettor are extremely rare. We were able to find only two.)

In *Waters v. P.*, 172 Ill. 367 (50 N. E. 148), appellant was indicted with three other persons for burglary. He was convicted on the testimony of his co-defendants. The defense was alibi. The opinion of the court sets forth the circumstances and law applicable to the case at bar (p. 374):

“* * * The eleventh instruction is to the effect that although the jury should believe that the movements of the plaintiff in error were accounted for some part or portion of the time before and after the commission of the crime charged in the indictment, still, before that defense was entitled to consideration, it must appear that at the very time

of the commission of the crime the plaintiff in error was at another place. This instruction, then, told the jury that before the evidence of an alibi was entitled to consideration, it must appear that at the very time of the commission of the crime plaintiff in error was in another place. If the testimony of McGrew, Farris and Maple (co-defendants) with reference to the plaintiff in error being with them from about seven o'clock until between three and four o'clock is true, then the testimony of the six witnesses for the defense accounting for his presence with them from seven until after nine o'clock, and the testimony of the five witnesses accounting for his presence from about a quarter of ten until after eleven o'clock, and the testimony of the two witnesses accounting for his presence with them from after eleven o'clock until after one o'clock, would necessarily be untrue. The jury would clearly have a right to take into consideration this testimony of the witnesses for the defense in determining the truth of the testimony of the three witnesses, Maple, McGrew and Farris, as to the plaintiff in error having been with them during the period of time from seven until one o'clock, and if their testimony was untrue in that regard, it would necessarily be rendered less credible as to the plaintiff in error being with them at the exact hour of the commission of the crime,—during the period of time between one and two o'clock and three and four o'clock, when the crime was committed, as testified to by Maple. The eleventh instruction took away from the jury the right to consider this testimony, and when taken in connection with the fourth instruction (*falsus in uno, falsus in omnibus*) was necessarily prejudicial to the plaintiff in error."

In *St. v. Bobbett*, 228 Mo. 252 (128 S. W. 953), the appellants were convicted of arson. The State contended that there was a conspiracy between the several

defendants and offered evidence to prove an attempt to commit the offense at a time prior to the actual burning. The defendants defended on the ground of alibi and denied the conspiracy. The court pointed out that in a case of conspiracy an alibi would not prevail because actual presence would not then be necessary for conviction. However, the court reversed the case for failure to properly instruct on alibi (p. 271):

“That this instruction in this case as requested by the defendants, should not have been given in the form in which it was asked, we have no doubt whatever, but the serious question presented is that, regarding this instruction as a prayer for a proper instruction on alibi (*State v. Fox*, 148 Mo. 527), should not the court, in view of the claim made by the defendants that there was in fact no conspiracy and that the testimony offered in their behalf tended to show that they were not present at the time the attempt was made to burn the house, in addition to directing the jury that if they found and believed from the evidence that there was a conspiracy on the part of the defendants and the other parties named, or some of them, to burn the house, they might find the defendants guilty, even though they were not present at the time of such attempt, have given a proper instruction that if they found there was no conspiracy, and they had a reasonable doubt as to whether the defendants were present at the time and place of the commission of the crime, they should give the defendants the benefit of such doubt and find them not guilty? We are clear that it should. The necessity for instructing on the evidence tending to prove an alibi grows out of the two theories on which the case was submitted to the jury by the court on the part of the State: one, that the evidence tended to show the actual presence and participation of the defendants in the attempt to burn the said

house, and the other, a conspiracy, in which their presence was not essential. We are unable in this case to say as was said in Gatlin's Case that the evidence is so overwhelming that the conspiracy can be assumed and no instruction on alibi was necessary."

Because of the refusal of Tomlinson's alibi prayers and the failure of the court to instruct at all upon that question, this case should be reversed.

IMPROPER ARGUMENT OF DISTRICT ATTORNEY

In the opening and again in the closing argument, the government attorneys were permitted to argue that had the defendant testified before the grand jury, he would not have been indicted (R. 100-104).

In each instance counsel for defendant Tomlinson moved the court to withdraw a juror and continue the case. This the court refused and exception was noted.

Tit. 28, U. S. C., Sec. 632, is as follows:

"In the trial of all indictments, informations and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, in the United States Courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

The statute covers proceedings before grand juries. The clause "other proceedings against persons charged with the commission of crimes" includes grand jury hearings.

The statute is very clear. It provides that no presumption shall be created because of failure of defendants to testify. The adjudicated cases, without exception, hold that this statute forbids the prosecuting officer to comment on the failure of a defendant to testify at the trial before a petit jury.

Price v. U. S., 14 App. D. C. 391;
Lorenz v. U. S., 24 App. D. C. 337;
Frisby v. U. S., 35 App. D. C. 513;
Lee v. U. S., 37 App. D. C. 442;
Sacks v. U. S., 41 App. D. C. 34;
Fulton v. U. S., 45 App. D. C. 27;
McHenry v. U. S., 51 App. D. C. 119;
Copeland v. U. S., 55 App. D. C. 106, 2 F (2) 634;
Mendelson v. U. S., 61 App. D. C. 127, 58 F (2) 532;
Harris v. U. S., 63 App. D. C., 232, 71 F. (2) 532.

The phrasing of the statute compels the conclusion that it is equally applicable to improper reference and argument concerning the failure of the defendant to testify before a grand jury.

No similar case has been found, but we submit the following instances as analogous.

In *Swilley v. St.*, 73 Tex. Cr. R., 619, 621, 166 S. W. 733, we find:

Again it was improper for the district attorney to ask the witness (defendant) whether or not he had testified at the habeas corpus trial. He had the right to testify or not, as he saw proper, and the fact he did not deem it necessary nor advisable to testify on the habeas corpus hearing would not be a circumstance against him. *Brown v. St.*, 57 Tex. Cr. R. 269, 122 S. W. Rep. 565, and cases there cited."

* * * * *

“Reversed and remanded.”

In *Parrott v. Com.* (20 Ky. L. R. 761) 47 S. W. 452, 453:

“* * * The bill of exceptions shows that one of the attorneys for the prosecution stated in his argument to the jury that there had been an examining trial of appellant, and that on that trial, although he had a right to do so, appellant had not testified, and that the first statement made by appellant about the difficulty was on that trial, when he testified; and then argued to the jury that his story was fabricated, and should not be believed. To this statement of the attorney appellant excepted, and asked the court to say to the jury that the statements were improper, which the court failed to do. * * *”

“Again, by section 223, subsec. 1, Cr. Code, it is provided that the defendant in criminal prosecutions may testify; ‘but his failure to do so shall not be commented upon, or be allowed to create any presumption against him, or her.’ This, in our opinion, applies equally to a failure to testify on the examining trial as before a jury trial; for, if it did not, an accused could not testify on an examining trial. So, in either case, the statement of prosecuting counsel was prejudicial error denounced by the statute.”

In *Newman v. Com.*, 28 Ky. L. R. 81, 88 S. W. 1089, 1092, the defendant was asked by the District Attorney why he did not testify on his application for bail. Counsel for defendant did no more than object to this question, but the court held it to be improper and reversed, saying:

“* * * It was improper for the (district) attorney to refer to the fact that the defendant did not testify as a witness upon the application for bail.”

In *Bunkley v. St.*, 77 Miss. 540, 541 (27 So. 638) :

“Upon the trial of the case in the circuit court the prosecuting witness, Pool, in answer to a direct inquiry of the district attorney calling for such answer, stated that there was a preliminary trial of the case and that Bunkley did not there, or at any time, make an explanation of his possession of the hogs. The question and answer were broad enough to cover the fact that Bunkley had not testified upon the preliminary investigation, and there offered an excuse for his being found in possession of the hogs. Other like testimony was given on the part of the state, over the objection of the defendant, and he here claims that this evidence violates sec. 1741, Code 1892, which makes the accused a competent witness for himself, but provides that his failure to testify shall not operate to his prejudice or be commented upon by counsel. That the district attorney did, upon the trial of the defendant, call the attention of the jury to the fact that the defendant, upon the preliminary investigation, did not take the witness stand and remove the inference of guilt that might be predicated of his being found in possession of property recently stolen, was, we think, a prejudice to the defendant, and in conflict with sec. 1741, Code 1892.”

In *Blackman v. St.*, 78 Ga. 592, 596 (3 S. E. 418), the defendant

“made a motion to continue this case for the absence of certain witnesses, by whom he expected to prove that he was not near the scene of the homicide at the time it took place. These persons were sent for. They appeared but he failed to introduce them. This motion was made, it will be remarked, before the jury was impanelled, and was probably made in writing, or if made orally, there

was no evidence of it before that jury; and it was certainly a very damaging circumstance to allow counsel (for the state) to proceed and argue the guilt of the prisoner from his failure to produce these witnesses; and when the court's attention was called to this subject, he should promptly have reproved the proceeding and admonished the jury that it was improper, and that they should give it no attention; but this he seems to have declined. * * * * we cannot undertake to say what influence the circumstance improperly insisted upon in the argument may have had upon the jury; and a new trial is therefore granted solely upon the 23rd ground of the motion."

The 5th Amendment of the Constitution provides:

"No person * * * shall be compelled in any criminal case to be a witness against himself."

In *Counselman v. Hitchcock*, 142 U. S. 547, 563, the Court, in speaking of this clause, said:

"But this provision distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury. A criminal prosecution under Article 6 of the amendments, is much narrower than 'a criminal case', under Article 5 of the amendments. It is certainly consistent with the language of Article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury."

By analogy, if the phrase "criminal case" includes grand jury proceedings, then the latter should also be included in the clause "other proceedings against persons charged with the commission of crime."

Such arguments as were made by the prosecutors not only invaded appellant's constitutional rights and privi-

leges, but the rights to which he was entitled by the statute.

Again the Government Was Permitted to Comment Improperly

That then and thereupon the following occurred:
(R. 104-105)

"Now, finally, I think I should say something about the reputation of this man for his character. It is, as Mr. O'Shea says, sometimes the only thing you can fall back on in a defense. I don't belittle it at all. I simply would like to tell you, however, what I think it is. It is what other people think of your character, the reputation you have managed to acquire for yourself through what people know about you, but more particularly what they do not know about you."

"I submit that the President of the Bar Association and one or two former presidents of the Association and the members of the courts of this District, and other reputable men, all of them reputable, whose word we would not think of questioning, who testified here, would not have so testified had they known and discussed among themselves the transactions which came out of Tomlinson's own lips, that he had been engaged in, mingling and fraternizing with Pratt's brother—"

"Mr. O'Shea: Now, we ask a juror be withdrawn. That is not the testimony given by him."

"Mr. Burnett: He had a perfect right to represent Pratt's brother or anyone else."

"Mr. Murray: I have not argued that he had not."

"Mr. Burnett: That is Tomlinson's testimony. That is no test of a man's reputation."

"The Court: Motion is overruled."

"Mr. Burnett: Allow us an exception."

"Mr. Murray: I am endeavoring to argue that

a man's reputation sometimes may consist of what people do not know about him. Mr. Wheatley put it in as good words as I could think of, and better: 'In a negative way, I would say he is all right.' "

CONCLUSION

It is most respectfully insisted that the appellant has not had a fair and impartial trial; that he was subjected to prejudicial errors which require a reversal of the judgment in this case.

Respectfully submitted,

JAMES A. O'SHEA,
JOHN H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Appellant J. Wm.
Tomlinson,
402 6th Street, N. W.

FILED SEP 7 - 1937

Monaschinski

IN THE

**United States Court of Appeals
for the District of Columbia**

No. 6987

J. WILLIAM TOMLINSON, ET AL.,
Appellants,
v.
UNITED STATES

BRIEF OF APPELLANT PRATT.

FRANCIS J. KELLY,
Attorney for Appellant Pratt,
Munsey Building.

IN THE
**United States Court of Appeals
for the District of Columbia**

No. 6987

J. WILLIAM TOMLINSON, ET AL.,
Appellants,

v.

UNITED STATES

BRIEF OF APPELLANT PRATT.

The Appellant, Phillip John Pratt, by his attorney, Francis J. Kelly, begs to inform the Honorable Justices of the Court of Appeals for the District of Columbia that he adopts the statement of facts and the points of law outlined in the brief filed in this case in behalf of the Appellant J. William Tomlinson, but assigns as additional error the refusal of the trial court to grant a continuance of this case when requested so to do by the Appellant Pratt and his attorney.

Appellant's attorney was appointed to defend Appellant on the afternoon of May 20, 1937, and the case was called for trial on the morning of May 24, 1937. Immediately before the selection of the jury Appellant informed the Court that he had not had sufficient time

to spend with his attorney in order to enable the latter to adequately prepare his defense. The motion for a continuance was denied and an exception noted.

In *Commonwealth v. O'Keefe* (298 Pa. 169) the defendant was charged with a misdemeanor and moved for a continuance claiming that he had not had sufficient time to prepare his defense. The motion was denied. The Supreme Court of Pennsylvania in reversing the judgment of the trial court said: "It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

In *Powell et al. v. Alabama* (287 U. S. 45), familiarly referred to as the *Scottsboro Case*, the Supreme Court of the United States said: "* * * a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense."

Conceding that the matter of a continuance is one very largely in the discretion of the trial court, nevertheless it may be reviewed on appeal and when in the opinion of the Appellate Court there was an apparent abuse of the discretion the case should be reversed and remanded.

Harrah, et al., v. Morgenthau, 65 W. L. R. 458;
House v. Cardinal, 122 N. E. 11;
Harrad v. Hutchinson, 105 S. W. 365;
Horr v. Easton, 211 N. W. 172;
Borman v. Geib, 221 Pac. 1006;
Rousch v. Cozian, 282 Pac. 251;
Krikorian v. Fermanian, 189 N. Y. S. 130;
Roberts v. Sinkey, 15 Pac. (2d) 427.

Conclusion

The Appellant Pratt therefore prays that the judgment of the trial court be reversed and that the cause be remanded for a new trial.

FRANCIS J. KELLY,
Attorney for Appellant Pratt,
Munsey Building.

FOR MR. JUSTICE ROBB - UNITED STATES
COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED OCT 8 1937

Memorandum

No. 6987—Special Calendar

**In the United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1937

**J. WM. TOMLINSON AND PHILLIP JOHN PRATT,
APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF ON BEHALF OF THE UNITED STATES

LESLIE C. GARNETT,
United States Attorney.

SAMUEL F. BEACH,
Assistant United States Attorney.

CHARLES B. MURRAY,
Assistant United States Attorney.

INDEX

	Page
Statement of the Case.....	1
The Demurrer and Motion in Arrest.....	4
Codefendant's Plea of Guilty.....	9
Smallwood's Testimony.....	11
Restriction of Cross-Examination.....	14
Privilege.....	14
Rebuttal Testimony.....	22
Accomplice Prayer.....	25
Alibi Prayer.....	29
Improper Argument to Jury by District Attorney.....	36
Denial of Continuance for Pratt.....	41

CASES CITED

<i>Bacon v. State</i> , 22 Fla. 51.....	32
<i>Baker v. U. S.</i> , 21 Fed. (2) 903 (C. C. A. 4).....	42
<i>Blackburn, Reg. v.</i> , 6 Cox, C. C. 333.....	29
<i>Blackman v. State</i> , 78 Ga. 592, 596, 3 (S. E. 418).....	39
<i>Bobbett, State v.</i> , 228 Mo. 252 (128 S. W. 953).....	34
<i>Boston v. State</i> , 94 Ga. 590.....	32
<i>Briceland v. Com.</i> , 74 Pa. St. (24 P. F. Smith) 463.....	32
<i>Brown v. State</i> , 57 Tex. Cr. 259.....	39
<i>Bunkley v. State</i> , 77 Miss. 540, 541 (27 So. 638).....	39
<i>Carlson, State v.</i> , 39 Or. 19, 28, 62 P. 1016.....	8
<i>Chirac v. Reinicker</i> , 11 Wheat. 280, 6 L. Ed. U. S. 474.....	21
<i>Cody, Com. v.</i> , 165 Mass. 133, 136, 42 N. E. 575.....	7
<i>Com., Briceland v.</i> , 74 Pa. St. (24 P. F. Smith, 463).....	32
<i>Com., Cody v.</i> , 165 Mass. 133, 136, 42 N. E. 575.....	7
<i>Com., Mowry v.</i> , 11 Allen (93 Mass.) 20.....	7
<i>Com., Newman v.</i> , 28 Ky. L. R. 81, 88, S. W. 1089, 1092.....	39
<i>Com., Parrott v.</i> , 20 Ky. L. R. 761, 47 S. W. 452.....	39
<i>Crono v. U. S.</i> , 59 Fed. (2) 339 (C. C. A. 9).....	42
<i>Crouch v. U. S.</i> , 298 Fed. 437.....	43
<i>Diggs and Cominetti v. U. S.</i> , 220 Fed. 545.....	40
<i>Egan v. U. S.</i> , 52 App. D. C. 384, 390 (287 F. 958).....	25
<i>Elliott v. U. S.</i> , 23 App. D. C. 456, 467.....	20
<i>Fisher, People v.</i> , 295 Ill. 250.....	34
<i>Funk v. U. S.</i> , 16 App. D. C. 478.....	14
<i>Goldsby v. U. S.</i> , 160 U. S. 70.....	42
<i>Graft v. Illinois</i> , 208 Ill. 312, 325.....	11

II

	Page.
<i>Grunberg v. U. S.</i> , 145 Fed. 81 (C. C. A. 1) -----	9
<i>Haickins v. U. S.</i> , 59 App. D. C. 249 -----	24
<i>Hayward, State v.</i> , 62 Minn. 474 -----	13
<i>Hiles, Spear v.</i> , 67 Wis. 361 -----	28
<i>Hoyt, State v.</i> , 47 Com. 518 -----	13
<i>Illinois, Graft v.</i> , 208 Ill. 312, 325 -----	11
<i>In re Marquez</i> , 3 Cal. (2) 625, 628, 45 P. (2) 342 -----	8
<i>Isaacs v. U. S.</i> , 159 U. S. 487 -----	42
<i>Katz, People v.</i> , 139 N. Y. Supp. 137 -----	12
<i>Klein v. People</i> , 173 Ill. 596 -----	32
<i>Lattimore, People v.</i> , 86 Cal. 403 -----	32
<i>Lee, U. S. v.</i> , 107 Fed. 702 -----	21
<i>Levine, People v.</i> , 85 Cal. 39 -----	32
<i>Marquez, In re</i> , 3 Cal. (2) 625, 628, 45 P. (2) 342 -----	8
<i>McGuire, State v.</i> , 135 N. Y. 639 -----	27
<i>McShann v. U. S.</i> , 38 Fed. (2) 635 (C. C. A. 10) -----	42
<i>Moore v. U. S.</i> , 150 U. S. 57 -----	14
<i>Mowry, Com. v.</i> , 11 Allen (93 Mass.) 20 -----	7
<i>Myers v. U. S.</i> , 223 Fed. 919 (C. C. A. 2) -----	42
<i>Newman v. Com.</i> , 28 Ky. L. R. 81, 88, S. W. 1089, 1092 -----	39
<i>O'Brien v. U. S.</i> , 51 Fed. (2) 193 (C. C. A. 7) -----	43
<i>Parrott v. Com.</i> , 20 Ky. L. R. 761, 47 S. W. 452 -----	39
<i>People v. Fisher</i> , 295 Ill. 250 -----	34
<i>People v. Katz</i> , 139 N. Y. Supp. 137 -----	12
<i>People, Klein v.</i> , 173 Ill. 596 -----	32
<i>People v. Lattimore</i> , 86 Cal. 403 -----	32
<i>People v. Levine</i> , 85 Cal. 39 -----	32
<i>People v. Todd</i> , 301 Ill. 85 -----	34
<i>People, Waters v.</i> , 172 Ill. 367 (50 N. E. 148) -----	32, 33, 34
<i>Price v. State</i> , 107 Ala. 161 -----	13
<i>Price v. U. S.</i> , 14 App. D. C. 391 -----	38
<i>Raffel v. U. S.</i> , 271 U. S. -----	39, 40
<i>Reg. v. Blackburn</i> , 6 Cox C. C. 333 -----	29
<i>Reinicker, Chiras v.</i> , 11 Wheat. 280, 6 L. Ed. U. S. 474 -----	21
<i>Rosenstein, U. S. v.</i> , 34 Fed. (2) 630 (C. C. A. 2) -----	41
<i>Roddie v. State</i> , 19 Okla. Cr. 63 (198 Pac. 342) -----	13
<i>Smith v. U. S.</i> , 53 App. D. C. 53 -----	44
<i>Spear v. Hiles</i> , 67 Wis. 361 -----	28
<i>Swilley v. State</i> , 73 Tex. Cr. R. 619, 166 S. W. 733 -----	38
<i>State, Bacon v.</i> , 27 Fla. 51 -----	32
<i>State, Blackman v.</i> , 78 Ga. 592, 596 (3 S. E. 418) -----	39
<i>State v. Bobbett</i> , 228 Mo. 252 (128 S. W. 953) -----	34
<i>State, Boston v.</i> , 94 Ga. 590 -----	32
<i>State, Brown v.</i> , 57 Tex. Cr. 269 -----	39
<i>State, Bunkley v.</i> , 77 Miss. 540, 541 (27 So. 638) -----	39
<i>State v. Carlson</i> , 39 Or. 19, 28, 62, P. 1016 -----	8
<i>State v. Hayward</i> , 62 Minn. 474 -----	13
<i>State v. Hoyt</i> , 47 Com. 518 -----	13

III

	Page.
<i>State v. McGuire</i> , 135 N. Y. 639-----	27
<i>State, Price v.</i> , 107 Ala. 161-----	13
<i>State, Roddie v.</i> , 19 Okla. Cr. 63 (198 Pac. 342)-----	13
<i>State, Swilley v.</i> , 73 Tex. Cr. R. 619, 166 S. W. 733-----	38
<i>State, Ware v.</i> , 67 Ga. 349-----	32
<i>Todd, People v.</i> , 301 Ill. 85-----	34
<i>Turner v. U. S.</i> , 57 App. D. C. 39-----	39
<i>U. S., Baker v.</i> , 21 Fed. (2) 903 (C. C. A. 4)-----	42
<i>U. S., Crono v.</i> , 59 Fed. (2) 339 (C. C. A. 9)-----	42
<i>U. S., Crouch v.</i> , 298 Fed. 437-----	43
<i>U. S., Diggs & Caminetti v.</i> , 220 Fed. 545-----	40
<i>U. S., Egan v.</i> , 52 App. D. C. 384, 390 (287 F. 958)-----	24
<i>U. S., Elliott v.</i> , 23 App. D. C. 456, 467-----	20
<i>U. S., Funk v.</i> , 16 App. D. C. 478-----	14
<i>U. S., Goldsby v.</i> , 160 U. S. 70-----	42
<i>U. S., Grunberg v.</i> , 145 Fed. 81 (C. C. A. 1)-----	9
<i>U. S., Hawkins v.</i> , 59 App. D. C. 249-----	24
<i>U. S., Isaacs v.</i> , 159 U. S. 487-----	42
<i>U. S. v. Lee</i> , 107 Fed. 702-----	21
<i>U. S., McShann v.</i> , 38 Fed. (2) 635 (C. C. A. 10)-----	42
<i>U. S., Moore v.</i> , 150 U. S. 57-----	14
<i>U. S., Myers v.</i> , 223 Fed. 919 (C. C. A. 2)-----	42
<i>U. S., O'Brien v.</i> , 51 Fed. (2) 193 (C. C. A. 7)-----	43
<i>U. S., Price v.</i> , 14 App. D. C. 391-----	38
<i>U. S., Raffel v.</i> , 271 U. S.-----	39, 40
<i>U. S. v. Rosenstein</i> , 34 Fed. (2) 630 (C. C. A. 2)-----	41
<i>U. S., Smith v.</i> , 53 App. D. C. 53-----	44
<i>U. S., Turner v.</i> , 57 App. D. C. 39-----	5
<i>Ware v. State</i> , 67 Ga. 349-----	32
<i>Waters v. People</i> , 172 Ill. 367 (50 N. E. 148)-----	32, 33, 34

**In the United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1937

No. 6987—SPECIAL CALENDAR

**J. WM. TOMLINSON AND PHILLIP JOHN PRATT,
APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF ON BEHALF OF THE UNITED STATES

STATEMENT OF THE CASE

Appellants were convicted of robbery and sentenced to serve terms in the penitentiary: Tomlinson from three to ten years, Pratt from three to eight years. They appeal, contending that the indictment was bad in substance; and that the court below erred in permitting co-defendant Charles Henry Bass to plead guilty in the presence of the jury; in compelling the appellant Tomlinson, an attorney, to testify concerning certain privileged communications; in admitting certain rebuttal evidence; in refusing to instruct the jury on accomplice testimony and on alibi; and in permitting

Government counsel to comment on Tomlinson's failure to avail himself of an opportunity to testify before the Grand Jury.

The facts in the case are substantially as follows: About the middle of May 1936 Tomlinson and Pratt conferred with one Walter Leonard Smallwood regarding a scheme to rob Samuel Saritanos, proprietor of a cleaning and pressing establishment at 3003 14th Street, Northwest, Washington, D. C. Smallwood refused to participate in the proposed robbery and two months thereafter Tomlinson and Pratt called in Charles Henry Bass on the scheme and he agreed to take part. Accordingly, on the morning of August 18, 1936, between 7:30 and 8:00 o'clock Bass and Pratt, armed respectively with a blackjack and a revolver, entered Saritanos' premises and robbed him of \$785.00, which he carried. Bass, and possibly Pratt also, beat Saritanos into insensibility and inflicted upon him permanent injuries of which he nearly died. Bass and Pratt fled from the scene and hurried to Pratt's house on I Street, some three or four miles away, where, by prearrangement, they were met by Tomlinson and the proceeds of the robbery divided equally among the three. Later that same morning the police recovered the blackjack at the scene of the robbery where Bass had dropped it as he was running away, and an unloaded revolver two or three blocks away in an alley past which Pratt and Bass had run after the robbery.

Bass was arrested four days after the robbery (Saturday, August 22, 1936) at his home, and that day made and signed a written statement (R. 43). The next person arrested was Tomlinson, who was arrested at his home at about nine o'clock on Sunday morning, August 23, 1936. Smallwood surrendered to the police later that day. Pratt, who left town after the robbery, was the last person arrested in the case. He was arrested in Baltimore several days after the others had been apprehended.

From the day of his arrest until his release five days later on bond, Tomlinson had the benefit of counsel.

To the indictment charging them with robbery, the appellants and Charles Henry Bass, the third defendant, pleaded not guilty. After the jury was sworn to try the case, and after Government counsel had made the opening statement to the jury, Bass suddenly changed his plea to guilty (out of the presence of the jury) and thereafter for the first time was interviewed with reference to testifying for the Government, and did testify as the Government's first witness. In his testimony, which he said was substantially the same as what he had told police (R. 21), he related as having come to his knowledge by his own observation or by information from Tomlinson, certain facts about Tomlinson which were corroborated as true facts by the

subsequent testimony of other witnesses, including Tomlinson himself and Mrs. Tomlinson, a defense witness.

ARGUMENT

The appellee takes the position that it is not necessary to deal in this brief with that portion of appellant's brief regarding "contradictions in the evidence", which it is respectfully submitted were questions of fact properly passed upon by the trial jury.

DEMURRER

The first point in appellant's argument concerns the refusal of the court below to sustain the demurrer to the indictment and the motion in arrest of judgment. The contention is made that the indictment does not charge robbery, but attempts to charge a distinct criminal offense—that is to say, a "crime of violence" under Sections 116a and 116b of the Code of Laws for the District of Columbia; that this attempt is not successful because the statute in question does not apply to robbery; and that therefore the indictment is bad in its entirety.

The Sections in question are as follows:

SEC. 116a. "Crime of violence", as used in this act, means any of the following crimes, or an attempt to commit any of the same, namely: Murder, manslaughter, rape, mayhem, maliciously disfiguring another, abduction, kidnaping, burglary, housebreaking, larceny, any assault with intent to kill, commit rape, or robbery, assault with a danger-

ous weapon, or assault with intent to commit any offense punishable by imprisonment in the penitentiary.

SEC. 116b. If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years; upon a second conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than ten years; upon a third conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than fifteen years; upon a fourth or subsequent conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for an additional period of not more than thirty years.

The indictment in this case, in addition to charging robbery in the precise form approved by this court in *Turner v. United States*, 57 App. D. C. 39 (where an objection was made that it was duplicitous), contained the additional allegation that the defendants, when they committed the crime, were armed with a pistol held in the hand of defendant Pratt. The purpose, of course, was to subject the defendants to the additional punishment pro-

vided in the above quoted Sections. Said Sections, it will be seen, do not apply to robbery by name; and the crime of assault with intent to commit robbery does not necessarily include robbery, which may be committed without assault (pickpocketing). Accordingly the court ruled that the "firearms" Sections did not apply. But the Court ruled that the allegations regarding the pistol might be treated as surplusage and that the remainder of the indictment properly charged robbery.

It is respectfully submitted that the statute in question does not create sixteen distinct and different offenses, as contended by appellant. The statute is not aimed at crimes of violence as such but only against the use of firearms in the commission thereof. The statute simply says that where a person commits one of those sixteen crimes when armed with a pistol, he may "in addition to the punishment provided for the crime" be further punished. The use of those words plainly shows an intention not to change the elements of the several old crimes mentioned. The statute adds no new necessary elements to the crime of robbery. A person is still guilty of robbery if he commits any of the acts contained in the robbery statute; but if when doing so he is armed, he may be subject to further punishment provided that the fact that he was armed is alleged and proved. The prosecutor in drawing an indictment for any of the sixteen crimes mentioned, may or may not add the allega-

tion that the defendant was armed. If as in this case, he does so in a case to which the firearms law does not apply, surely the entire indictment is not thereby vitiated.

The cases of *Commonwealth v. Cody*, 165 Mass. 133, and *Commonwealth v. Mowry*, 11 Allen (93 Mass. 20), cited by the appellant, construed a Massachusetts statute reading as follows:

Whoever assaults another, and feloniously robs, steals, and takes from his person money or other property which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent if resisted to kill or maim the person robbed; or being so armed wounds or strikes the person robbed; shall be punished by imprisonment in the state prison for life.

In the *Cody* case the only question decided was that the indictment sufficiently charged that the weapon was dangerous. In that case the Court made the statement that the being armed was the gist of the offense. In the *Mowry* case the Court ruled that it was not necessary to allege or approve that the defendant assaulted the victim with the weapon with which he was armed, stating that the intention of the statute was to prohibit an assault of any sort by an armed robber, on the ground that it might lead ultimately to the use of the weapon itself.

It is plain that the Massachusetts Statute is not violated at all unless the robber is armed with a

dangerous weapon. That statute does not provide a certain punishment for a robbery committed without a firearm and a certain additional punishment for robbery committed with a firearm.

The appellant cites the case of *State v. Carlson*, 39 Oregon 19. The statute involved in that case was similar to the Massachusetts Statute but the only question decided by the decision was that the indictment sufficiently charged that the weapon was aimed at the victim, as the statute provided it should be.

The fourth and last case cited by appellant on this point is *In Re Marquez*, 3 Cal. (2) 625. It involves a statutory construction without apparent application to the point in question. Marquez pleaded guilty to rape and was placed on probation for twenty years with the proviso that the first four years thereof should be spent in a State road camp. After one year he sought release on habeas corpus, citing a statute which said that "In no case shall any person sentenced to confinement in a county or city jail on conviction of a misdemeanor, or as the condition of probation, or for any other reason be committed for a period in excess of one year." The Court in overruling the petition cited other statutes which provided that the Court in granting probation might as a condition thereof imprison the defendant in a county jail "for a period not exceeding the maximum time fixed by law in the instant case" and further that in counties where road camps were available the Court might

place the defendant there; and further that the term of probation might be as long as the maximum sentence. The Court held that when the first statute was read in connection with the others its proper interpretation was that it applied only to persons committed to the county jail for misdemeanors.

CODEFENDANT'S PLEA OF GUILTY

At the trial below the defendant Bass pleaded guilty and his case was referred to the Probation Officer. Appellant contends that this act occurred in the presence of the jury and thereby the appellant's rights were prejudiced by creating in the minds of the jury a high opinion of Bass' credibility because of his slight criminal record. The record (p. 18) is ambiguous on this point; but the fact is that the plea of guilty and reference to the Probation Officer occurred out of the presence of the jury. Thereafter Bass took the stand and from his testimony and his manner on the stand, the jury had ample opportunity to evaluate his credibility; and it was by virtue of the cross-examination only that the jury was informed that the defendant had pleaded guilty and that probation was possible and as to the extent and limit of Bass' previous criminal record (R. 21, 26).

In the case of *Grunberg v. United States* (CCA 1), 145 Fed. 81, the Court held that it was no error for a trial court to permit codefendant to plead

guilty in the presence of the jury which was trying the other defendants.

In that case Grunberg, one Burman, and others were indicted for conspiracy to defraud the United States. Burman pleaded guilty in open court in the presence of the jurors who were to try the other defendants. Grunberg and others were convicted and appealed. The Court said at page 86:

The next point taken by the plaintiffs in error is with reference to the plea of guilty by Burman in open court. As we have said, Burman was one of the Glasgow Company indicted with Grunberg and Baitler and pleaded guilty. His plea was taken in the presence of the panel before the jurors were called, against the objection of the plaintiffs in error. We can, however, hardly regard this as prejudicial because it is impossible to escape the belief that the fact that Burman had pleaded would come out in the course of the trial and also that it would become a matter of common knowledge about the court room, which the entire panel would inevitably be affected by. Moreover, it was the right of the United States to have Burman separately plead guilty, and then to call him as a witness against the other persons indicted, if it so desired. On his pleading guilty, his constitutional protection against self-incrimination ceased. *Benson v. United States*, 146 U. S. 325, 333, 13 Sup. Ct. 60, 36 L. Ed. 991. This greater right clearly covers the lesser right involved in disposing of Burman in the way in which it was done.

Indeed, in the course of its charge, the court informed the jury that the defendant had pleaded guilty as it was proper and right that it should. The true answer to the whole is that this was one of the ordinary incidents of a trial, which is within the discretion of court and which we cannot revise.

To the same effect is *Graft v. Illinois*, 208 Ill. 312, 325, affirmed 108 Illinois Appeals, 168.

SMALLWOOD'S TESTIMONY

It is argued that the court below erred in permitting the witness Smallwood to testify regarding the efforts of Tomlinson and Pratt three months before the crime to induce Smallwood to take part in that crime. This evidence was plainly admissible to show intent on the part of the appellants to commit the crime, which they later in fact did commit. It would seem that where three defendants are charged with robbing a certain individual at a certain place in August 1936, it is competent and relevant for the Government to show that two of those defendants planned to commit that particular robbery on that particular individual, at that particular place, in March 1936. Indeed, the transaction about which Smallwood testified was deemed by the appellant Tomlinson to be so closely related to the crime charged against him as to render Smallwood an accomplice, and Tomlinson in his Prayer No. 18 (R. 114) makes that contention.

The law seems to be settled that evidence of attempts, plans, and preparations for crime by the defendant are admissible to prove the subsequent commission of that crime by said defendant. They are admissible to prove his intent. They are certainly stronger evidence that a person committed a particular crime than would be the evidence of threats by a person charged with a homicide of the person threatened, and these, of course, are admitted in every homicide case where they exist.

The case of *People v. Katz*, 139 N. Y. Supp. 137 appears to be in point. In this case the defendant Katz was charged with the larceny of certain securities from a man named Heinze. The state did not contend that Katz physically stole the securities but they charged him as a principal under a statute similar to that in this district which makes principals those who at common law were accessories before the fact. The plan whereby Katz and his codefendants were to obtain possession of the securities was this: they would actually loan money to Heinze, who would turn over to them collateral securities of a value much greater than the money loaned; and thereafter dispose of the securities. Heinze was reluctant to deliver his securities to an irresponsible person and it was accordingly necessary for the defendants to procure some reputable brokerage house actually to loan the money. For this purpose Katz sought the assistance of a person named Schwede. The report of

the case does not show what occurred between them, but at the trial of the case subsequently Schwede was called as a state witness to testify regarding the efforts of Katz to enlist his services. Objection was made to this testimony as proving another crime and as irrelevant. But the Court said, p. 140:

In our opinion the evidence was relevant, as tending to show the nature of the conspiracy upon which the defendant had embarked and the preparations which he made to carry it out. Evidence of preparation to commit a crime stands upon the same footing as evidence of previous attempts to commit it, and is always relevant.

In the case of *State v. Hayward*, 62 Minn. 474, where a defendant was charged with the homicide of a certain woman, evidence was admitted that four months before the homicide the defendant had talked with a person in the hacking business with reference to the possibility of driving a hack containing an occupant into a river and causing the occupant to drown. In this conversation the defendant had not indicated to the witness what person, if any, he had in mind.

In the case of *Roddie v. State*, 19 Okla. Cr. 63, 198 Pac. 342, the Court stated that "evidence is always relevant which shows that a defendant made preparations to commit a crime."

In the case of *State v. Hoyt*, 47 Conn. 518, 538-9, and *Price v. State*, 107 Ala. 161, there were ad-

mitted in evidence statements made by the defendant prior to the offense indicating his intent to commit it. See also *Funk v. United States*, 16 App. D. C. 478, 491, and *Moore v. United States*, 150 U. S. 57.

CROSS-EXAMINATION

In their brief at page 22 the appellants contend that counsel for Tomlinson was restricted in his cross-examination of the witness Bass. The record (pages 23 and 24) shows plainly that Government counsel objected to the form of a certain question as confusing and misleading, and not to the line of examination being pursued. The Court, in sustaining the objection, invited counsel to pursue the inquiry in a different form, but counsel did not avail himself of that invitation. He abandoned the line of inquiry, indicating that he would rather rely upon his exception. It is submitted that no error was committed.

PRIVILEGE

Appellant Tomlinson seeks reversal on the ground that while on the stand in his own defense he was compelled on cross-examination to disclose the name and business of a certain client (who was neither a witness nor a party in the case). The appellee's answer to this contention is that the questions did not call for privileged communications; that the disclosure was not in fact prejudicial; and that the privilege involved, if any, was the client's and not Tomlinson's.

It will be remembered that the government evidence tended to show that Tomlinson and Pratt had endeavored to get Smallwood to commit this crime and thereafter had obtained the services of Bass. The appellant Pratt, as a defense witness, had testified that he hauled whiskey for a bootlegger named Falke and that Mr. Tomlinson was employed by Falke, and it was through Falke that he had met Tomlinson. He had also testified that certain services which Pratt had rendered him, Tomlinson, had been paid for by Falke, who in turn took the money out of witness' salary; also that on one occasion Pratt had told Bass if he needed a lawyer to get Tomlinson. Tomlinson then took the stand in his own defense and on direct examination (R. 83-88) testified that he had known Pratt since 1935 and had represented Pratt and his family and that on August 7, 1936, Pratt called him with reference to an automobile accident, stating that it was in connection with a client of Tomlinson's; that Tomlinson discussed the case with Pratt and it later developed that the accident did not occur on the business of this client and Tomlinson told Pratt that if he represented him, Pratt would have to pay Tomlinson \$35 because Tomlinson's client would not pay him. To this Pratt had replied, "Well, he owes me \$45.00 from last week's work; tell him to pay you out of that." Tomlinson also testified on direct examination that he had met Smallwood when Smallwood was brought into

Tomlinson's office by a client and was asked to represent Smallwood if he ever got in trouble (R. 85).

It was in this state of the evidence that government counsel began the cross-examination of Tomlinson. After Tomlinson had testified regarding a telephone conversation with Smallwood on August 20, 1936, the following occurred:

Q. And he was brought in there, as I understand it, by a client of yours?

(Mr. TOMLINSON:)

A. That is right, sir.

Q. Who was the client?—A. I don't—I refuse to answer about my clients.

Mr. BEACH. I think I have a right to know who brought this man Smallwood to his office, if the Court please.

The COURT. He may answer.

Mr. O'SHEA. May the jury step out for a couple of minutes, if the Court please, so we can get this matter straightened out?

The COURT. No; I don't think that is necessary.

The WITNESS. If Your Honor please, being a member of this bar, I don't think I am called on to answer any client's name——

The COURT. Yes, you made your objection——

The WITNESS. That I have had.

The COURT. Yes, you have made your objection.

Mr. O'SHEA. May we reserve the exception to his inquiry on that?

The COURT. Yes.

By Mr. BEACH:

Q. Who was your client?—A. Falke, F-a-l-k-e.

Thereafter, Tomlinson testified without objection that Falke had told him in February 1936 that Smallwood no longer worked for him and that when he (Tomlinson) had met Pratt in the fall of 1935, Falke had told Tomlinson to take care of Pratt in case the latter ever got in trouble. Then at a later point in the cross-examination Tomlinson was asked what was Falke's business. Whereupon, the following occurred:

A. I don't think I have to answer that question.

Mr. BEACH. I think I would like to know what a client's business is.

The COURT. He may answer.

Mr. O'SHEA. May we have an objection and exception?

The COURT. Yes.

A. He was in the liquor business and in the number business, sir.

By Mr. BEACH:

Q. When you say "the liquor business", do you mean that he was hauling from the A. B. C. Brewery?

Mr. O'SHEA. Same objection, same exception, I suppose?

The COURT. Yes.

A. Hauling it down from New Jersey.

By Mr. BEACH:

Q. Hauling it down from New Jersey? He was telling you where he was bringing it

from?—A. I knew where it was coming from.

Q. How did you know that?

Mr. O'SHEA. This is all under our objection and exception, I take it, if the Court please.

The WITNESS. A fellow was picked up—

Mr. O'SHEA. Just a minute, please, Mr. Tomlinson. Let the Court rule.

Mr. BEACH. I withdraw the question.

Mr. O'SHEA. Then I ask that a juror be withdrawn and the case continued. The District Attorney knew he was doing something he ought not to do under the circumstances.

The COURT. The motion is overruled.

Mr. O'SHEA. Give me an exception.

At a still later point in the cross-examination (R. 93) when Tomlinson was questioned as to how his clients could get in communication with him during the daytime if, as he had testified, he had no office, Tomlinson replied, "I may say in connection with that that they haul whiskey at night and not in the daytime."

The relevancy of the foregoing examination cannot be questioned. From the state of the evidence when the questions were asked it is submitted that no prejudice could possibly have resulted. The only thing that Tomlinson was required to disclose over his objection was that the name of his client was Falke and that his business was that of a bootlegger and numbers writer. Aside from the fact that Pratt had already disclosed that Falke was a bootlegger and that Tomlinson was his attorney,

how can it be said that an attorney is prejudiced by the disclosure of the fact that he represented a criminal?

Not everything which an attorney knows or believes about his client is due to a communication from him; and not every communication from him is privileged. In *Wigmore on Evidence*, Second Edition, Section 2292, page 21, a privileged communication is defined as follows: “(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.”

The privilege of secrecy with which the law surrounds communications between a client and his attorney is for the benefit of the client and not for the benefit of the attorney (*Wigmore*, Sec. 2321, p. 74). The very case on which the appellant seems most strongly to rely recognizes this fact, although that part of the decision is not included in the quotation from the case in appellant's brief. The paragraph of the quotation from the opinion beginning with the words “Professional communications” and quoted by appellant on page 26 of his brief appears on page 468 of 23 *Apps. D. C.* and reads as follows:

Professional communications, made by client to an attorney, or communications

passing between client and attorney, are, upon principles of public policy, and from the necessity of preserving confidence in all matters of business where the assistance or agency of an attorney is required, held to be privileged from disclosure; and this privilege is that of the client rather than that of the attorney. This privilege embraces all communications made by the client to his attorney for and in the course of the business for which the attorney may be employed. The latter cannot be permitted to disclose such communications whether they be in the form of title deeds, wills, documents, or other papers delivered or statements made to him, or of letters, entries, or statements, written or made by him in that capacity.

In the trial below Tomlinson on his direct examination had volunteered statements about his "client" and about his "client's business", and when he was asked on cross-examination what was the name of the client and the nature of his business, he sought refuge for his own protection in the privilege which the law has intended for the client.

The case of *Elliott v. U. S.*, 23 App. D. C. 456, 467, can be distinguished from the instant case. In the *Elliott* case an attorney, having already disclosed that a certain client had come to him as attorney for the purpose of drawing a will, was then asked to disclose the name of the client, and refused to do so. He was committed to jail for contempt, and the case was before this

Court on the refusal of the judge who had committed him to release him on habeas corpus. This Court held that he could not be legally compelled to divulge the name of his client. This Court recognized the rule approved in *Chirac v. Reinicker*, 11 Wheat. 280, 295, that ordinarily an attorney can be made to disclose the name of his client in order that the Court may determine the relationship, but said the rule was not of universal application and had no application to that case.

It is clear that, having already disclosed the business on which the client had sought his professional services, to disclose the name of the client would have done violence to the privilege, which calls into play a "special consideration" (Section 2314, page 61, Wigmore) where the matter between attorney and client is the drawing of a will. See *U. S. v. Lee*, 107 Fed. 702.

No such situation existed in this case. The defense having already put into the case evidence that Pratt had met Tomlinson through a common employer, Falke, the bootlegger, and that Smallwood had met Tomlinson through a client of Tomlinson's, it was important to determine whether the latter client was the same as the former; and this could best be learned by inquiring the name and the business of the client. Those questions, put to an attorney who appeared to have personal knowledge of his client's business, would not seem on their face to require the disclosure of privileged communications; if they did, it was the

duty of Tomlinson, who alone knew the source of his knowledge or belief, to state his objection precisely and definitely. Assuming only for the purpose of stating the argument that a privileged communication was exacted from him, it did not injure him in fact because the disclosure was already in the case by the testimony of himself and Pratt, and it did not injure him in law because it was the privilege of his client and not his own which was violated.

REBUTTAL TESTIMONY

Under the heading "Rebuttal Testimony" the appellant in his brief contends that certain rebuttal testimony was improperly admitted.

It is said that, to the appellant's testimony that he was not shown certain statements of fact in the case *on the day he was arrested*, and that the first thing he knew about the crime was when the case was presented to the Grand Jury, the Government was wrongfully permitted to rebut that Officers Thompson, Keck, and Brass read certain portions of statements of fact to the appellant *five days after his arrest* and while he was still in custody. But part of Tomlinson's defense in this case was that throughout the period of his confinement by the police he was never informed of the facts in the case and that was his reason for not making any statement to the police regarding his alleged connection with the crime. The obvious effect of that portion of Tomlinson's testimony above referred to, if believed, would be to bear out his contention,

and it was clearly proper for the Government to dispel that impression by proof that *police officers at some time* had made Tomlinson acquainted with certain facts in the case.

It is contended that after Bass had testified that nobody had promised him probation and that he had never told his attorney, Dorsey K. Offutt, that two police officers had done so, and after Mr. Offutt had testified that Bass had made such a statement, the Government should not have been permitted to show by the two police officers in question that neither had promised Bass probation. It is contended that the testimony that Bass had made a certain statement of fact could not be rebutted by proof that the fact was non-existent.

This argument is fine drawn. The obvious purpose of appellant's effort at the trial to show that Bass had made the statement attributed to him by defense witness Offutt was to show that Bass had in fact received a promise of probation. It was accordingly proper for the Government to prove that the alleged fact was not true and to argue therefrom that it was unlikely that Bass had made the statement that Offutt said he made; for although the disputed testimony had to do with whether a certain conversation had or had not occurred, the important issue raised was the truth or falsity of the matter allegedly discussed in the conversation; that is, whether Bass had or had not been promised probation. And it must be remembered that Bass

had been asked on cross-examination not only whether he had made the statement to Mr. Offutt but whether Inspector Thompson and Captain Keck had promised him probation (R. 22, 26, 41).

In the case of *Hawkins v. United States*, 59 App. D. C. 249, appellant was convicted of murder in the first degree. Error was assigned on the admission of the testimony of a witness in rebuttal as to certain conversations that the witness had with the defendant, in which he was alleged to have made threats against the defendant. On cross-examination he was asked concerning a visit to the home of the witness in question and as to certain conversations with that witness. He denied having had the conversations; and it was to rebut or rather impeach his testimony on that point that the witness was examined. Said the Court:

We think the testimony was competent in rebuttal.

It is that character of testimony which may be introduced either in chief to establish declarations and threats made by the defendant, or it may be reserved for rebuttal, if the facts relating to the conversation are denied by the defendant in his cross-examination. The prosecution, by reserving it for rebuttal, merely takes the chance of the defendant's refusal to testify, in which instance the prosecution would lose the benefit of the testimony. But in this case, where the defendant submitted himself to examination as a witness, it was competent to ask

him on cross-examination the facts relating to the alleged conversation. If he had admitted them, that would have been the end of it, but his denial opened the door for impeachment on rebuttal.

ACCOMPLICE PRAYER

At the trial below the appellant Tomlinson requested the Court to instruct the jury (R. 114) as follows:

The jury are instructed that the witness Smallwood is admittedly an accomplice in the perpetration of the crime alleged in the indictment. Under such circumstances the testimony of the witness Smallwood should be received with great care and caution.

The Court refused this instruction, but did grant appellant Tomlinson Prayer No. 21 (R. 115) and instructed the jury as follows:

The jury are instructed that while the witness Smallwood is not an accomplice strictly speaking, inasmuch as from his own evidence he morally implicates himself in the act, the jury should consider that circumstance as bearing on his credibility.

The appellant contends that the Court erred in refusing the accomplice instruction.

This Court in the case of *Egan v. United States*, 52 App. D. C. 384, 390, which case is referred to in the appellant's brief, said in effect that an accomplice is a person who advises, incites, or connives at the offense, or aids or abets the principal of-

fender, or counsels, commands, induces, or procures the commission of the crime. The question in this case therefore is whether Smallwood did any of those things.

The crime for which the appellants were being tried was the robbery of one Saritanos on the morning of August 18, 1936, at Saritanos' place of business at 3003 14th Street NW., Washington, D. C. It is with reference to that crime which Smallwood, to be an accomplice, must have aided, abetted, etc., as defined above.

Smallwood's testimony (R. 33-39) is the only evidence in the case of his participation. This testimony tends to show that in May 1936 Smallwood was approached by Tomlinson and Pratt and urged to take ^{part} in the proposed robbery of Saritanos. Smallwood talked with Tomlinson and Pratt on two or three occasions, and with Pratt on some other occasions. On one of the occasions when all three were together, they drove past Saritanos' shop to look the situation over. Two or three days after the first conference, Smallwood told Pratt he would have nothing to do with the robbery, and two or three days after that he told Tomlinson the same thing. That was the only answer he ever made to them. Beginning about the first of June 1936 Smallwood discontinued even listening to any talk about the scheme, and Tomlinson and Pratt abandoned it for the time being and took it up again about two months later with a

new third party. Far from encouraging the commission of the crime, Smallwood, by his conduct in May 1936 caused the plan to collapse and to lie dormant until a willing participant could be found.

It is submitted that Smallwood was not an accomplice, but no more in this case than what the Government used him for—an eyewitness to the planning of Tomlinson and Pratt to commit the crime.

In the case of *State v. McGuire*, 135 N. Y. 639, McGuire was convicted of the murder of a Mrs. Gregory, which was committed in the perpetration of a robbery. It appeared that one of the State witnesses was a man named Brazington who was with the deceased's husband when the crime was committed. In discussing the credibility of the witness Brazington, the Court stated at page 64:

He cannot be regarded as an accomplice in the commission of the crime. When it was done he was at work with Gregory in the celery field and never was gone for a moment. There is no evidence that he knew before hand of the expedition to Gregory's on that day, or in any manner aided or abetted it. There is proof that he had talked approvingly of a robbery, and even started once with McGuire to execute it, but he is in no manner connected with the actual offense committed except by his silence after he heard of it.

It does not appear from the report of this case whether the robbery which Brazington started out

on once with McGuire was the same robbery which later resulted in the death of Mrs. Gregory.

In the case of *Spear v. Hiles*, 67 Wis. 361, the Court, at page 363, quotes several definitions of the term "accessory before the fact":

It is laid down by Lord Hale "that an accessory before the fact is he who, being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit the felony." 1 Hale, 615. In 2 Hawk., ch. 29, sec. 16, it is said that "it seems to be generally holden that those who, by showing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, are all of them accessories before the fact, both to the felony intended and all other felonies which shall happen in and by the execution of it, unless they retract and countermand their encouragement before it is actually committed." One who barely conceals a felony which he knows to be intended, is not an accessory. 2 Hawk., ch. 29, sec. 23. Neither is tacit acquiescence, nor words which imply mere permission, sufficient to constitute the offense. There must be some active proceeding on the part of him who is charged as an accessory, or he is not guilty of the offense. Arch. Crim. Pl. 12, 13. Yet express consent to a proposed felony, especially if the person consenting thereto entertains malice toward

the object of the proposed felony, may make such person an accessory to the felony when committed.

In the case of *Reg. v. Blackburn*, 6 Cox C. C. 333, it appeared that one Walsh agreed with the defendant Moore to rob and kill a certain individual. By this agreement Walsh was to call at Moore's house, and together they were to go to the place of the proposed crime. Walsh did call at Moore's house, but it was too late to go that day, and it was agreed that Walsh should come back the next day for the same purpose. Walsh did not go back to Moore's house, and Moore went alone to the place and committed the robbery and murder. It was held that Walsh was not an accessory.

Inasmuch as the question here involves the application of recognized law to a particular state of facts, it seems not inappropriate to call to the Court's attention the discussion at the bench in the trial of this case wherein appellant's counsel, upon being informed of what Smallwood was about to testify to, objected to the testimony as irrelevant (R. 33-34).

ALIBI

Appellant Tomlinson by his prayers 22, 23, and 24 (R. 116-118) requested what he terms "alibi" instructions, which the Court refused.

Before discussing the prayers, a brief reference to the evidence might be in order. The government contended that Tomlinson was not present

when and where the crime was committed, but that he conspired with the actual perpetrators beforehand and met them afterward and split the proceeds. This contention was based on the testimony of government witnesses Smallwood and Bass, according to which Tomlinson at several places—which were described with fair certainty—and at several times—which were not fixed with certainty—had planned the robbery in company with the witnesses in question. Tomlinson introduced several witnesses to prove his absence from the company of Smallwood and Bass at certain fixed times. This evidence, of course, did not contradict the testimony of Smallwood and Bass. In all fairness, it must be said that that would be impossible. For instance, when Bass testified that he met Tomlinson at a certain place “around the 15th of July” (R. 18), it would have been futile for Tomlinson to have accounted for his presence elsewhere throughout that day. The only defense evidence which in fact contradicted Smallwood and Bass was the testimony of Mr. and Mrs. Tomlinson that on the morning of the robbery he took her to her place of employment—which, if true, would have made it impossible for him to have been at Pratt’s house on I Street where the fruits of the robbery were divided.

Where is the alibi evidence? The only defense evidence inconsistent with the government evidence has reference to an incident which in and of

itself would make Tomlinson not a principal (that is, an accessory before the fact at common law) but an accessory after the fact. Yet the appellant, by his prayer 22, wanted the jury instructed that if they had a reasonable doubt that Tomlinson was at the places where and times when Smallwood said he was, they should acquit; and by prayer 23 a like instruction as to witness Bass; while prayer 24 as drawn was capable of the construction that if the jury entertained a reasonable doubt as to Tomlinson's being at any one of the places where Bass and Smallwood said he was, they should acquit. Plainly these prayers were not proper.

Was any alibi instruction in order? Appellant says that where an alibi defense is made, the Court must give an instruction thereon for the defense. He quotes no cases in support of this doctrine, saying that it is unnecessary. The appellee believes it is impossible. The trend of the authorities is—or at least has been—to cast suspicion on alibi defenses, and most of the so-called alibi instructions are given for the prosecution. It is where such instructions have gone too far that reversals have resulted, as in the two cases cited by appellant. The authorities most favorable to the defense on this question say that an alibi defense is not to be treated differently from other defenses. Obviously that result is reached if, as in this case, the court in its instructions makes no mention of the word “alibi.” It is difficult to follow the conten-

tion that Tomlinson was injured because the Court did not tell the jury "Tomlinson's defense is an alibi"; because that word enjoys even less respect among laymen than it has in the law.

The following cases are authority for the proposition that alibi evidence must be such as to make it impossible that the defendant could have committed the crime:

Bacon v. State, 22 Fla. 51;
Ware v. State, 67 Ga. 349;
Boston v. State, 94 Ga. 590;
Klein v. People, 173 Ill. 596;
Briceland v. Commonwealth, 74 Pa. St. (24 P. F. Smith) 463.

In the cases of *People v. Levine*, 85 Cal. 39, and *People v. Lattimore*, 86 Cal. 403, the lower court instructed the jury that the defense of alibi "is often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny." In both those cases the Court of Appeals of California affirmed the conviction and only mildly criticized the instruction, stating that "the defense of alibi is not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in the cause."

The appellant cites the case of *Waters v. People*, 172 Ill. 367 (50 N. E. 148). It is interesting to note that the word "alibi" is not mentioned in the syllabus. The defendant Waters was convicted on the

uncorroborated testimony of three co-defendants who were admitted perjurers, and the jury was instructed to disregard utterly the testimony of defense witnesses of apparently high repute. The evidence for the state was that one of the co-defendants went into a store at one o'clock in the morning, remained there two hours, during which time he stole some money, and then came out about four o'clock and divided the money with the others, including Waters. The report of the case as read by appellee would indicate that Waters was just outside the store and was therefore a principal in the second degree at common law. The state evidence was to the effect that Waters had been in company with the other defendants from seven o'clock the previous evening. Waters denied this and introduced witnesses who accounted for his presence elsewhere from seven o'clock the previous evening until about one o'clock next morning, but not thereafter. The trial court instructed the jury that before the testimony of the defense witnesses would be "entitled to consideration", it must account for the whereabouts of the defendant at the precise time the crime was committed, thereby excluding from consideration the defense evidence which was in flat contradiction of all the state witnesses. The case was reversed on appeal because of this instruction.

The Court of Appeals of Illinois, in 1922, some twenty-five years after the decision in the *Waters*

case, distinguished it in the case of *Peo. v. Todd*, 301 Ill. 85. In that case the defense in the trial was in the nature of an alibi and the Court at the request of the prosecution gave an instruction to the effect that although the evidence accounted for movements of the defendant some part of the time before and at the time of the commission of the crime, before such defense would authorize an acquittal of the defendant it must appear that at the time of the commission of the crime charged in the indictment the defendant was at another place so far away and under such circumstances that he could not with ordinary exertion have reached the place where the crime was committed so as to have participated therein. The Court of Appeals held this instruction to be a proper one and distinguished the *Waters case* as well as the case of *People v. Fisher*, 295 Ill. 250, because the trial court in those cases had instructed the jury that the alibi defense would not be "entitled to consideration" unless it was exact as to time and place.

The appellant also cites the case of *State v. Bobbitt*, 228 Mo. 252 (128 S. W. 953). In that case the defendants were convicted of an attempt to commit arson. The State contended that before the attempt to burn the house was made the defendants had entered into a conspiracy elsewhere to commit the crime, and that immediately following the conspiracy they went to the place where the crime was committed. The defendants denied the

conspiracy and offered evidence to show that they were not present at the place where the attempt was made to burn the house. The Court in its instruction told the jury that if they found that a conspiracy existed, the defendants would be guilty even though they were not present at the scene of the crime. The Court failed to give a requested instruction for the defense on alibi. The Court of Appeals held that the trial court should have instructed the jury that if they found there was no conspiracy and also had reasonable doubt as to the presence of the defendants at the scene of the crime, they should acquit, stating its reason as follows:

The necessity for instructing on the evidence tending to prove an alibi grows out of the two theories on which the case was submitted to the jury by the court on the part of the State: one, that the evidence tended to show the actual presence and participation of the defendants in the attempt to burn the said house, and the other, a conspiracy, in which their presence was not essential.

The Court had this to say in its opinion about alibi evidence:

* * * but it is obvious that the mere proof of his presence at a place other than the place of the crime will not demonstrate his innocence if there is proof that, though absent at the time, he was one of a band of conspirators acting in concert to commit the

offense, and one of his coconspirators does commit the offense in his absence. In *State v. Gatlin*, 170 Mo. 369, 370, which was a case of murder and a charge of conspiracy, the defendants requested an instruction of alibi, and Judge Sherwood, speaking for this court, said, in regard to the denial of said instruction: "Besides, inasmuch as a conspiracy on the part of defendant and Crite, at least, to kill Graham was so abundantly established, it made no difference whether defendant was present or absent when the murder was committed, and so an instruction on alibi would have misled the jury."

The Court in the Bobbitt case also said:

We are unable in this case to say, as was said in Gatlin's case, that the evidence is so overwhelming that the conspiracy can be assumed and no instruction of alibi was necessary.

All the evidence for the government against Tomlinson showed, if it showed anything, that Tomlinson conspired to commit this offense but was absent when it was committed.

ARGUMENT OF GOVERNMENT COUNSEL

The final point in the argument in the brief of appellant Tomlinson (page 34) is that the Court below erred in permitting government counsel to comment to the jury on Tomlinson's failure to avail himself of an opportunity to appear before the Grand Jury before he was indicted in this robbery.

To this argument the appellee says briefly that the subject in question was brought into the case solely by the appellant Tomlinson on his direct examination, and the government had as much right to comment on that evidence as on any other evidence in the case. Not in its opening statement to the jury, nor in any statement made in the court room, nor through any of its witnesses did the government make any mention of the fact (which, of course, it knew) that Tomlinson had had an opportunity to appear before the Grand Jury and had elected not to avail himself of it. The word "Grand Jury" was mentioned for the first time in the case by Mr. O'Shea when questioning his client, defendant Tomlinson, on direct examination. On page 86 of the record, the following appears:

Q. Did you make a request to go before the grand jury?—A. Did I? No, sir.

Q. Did I advise you not to make a request to go before the grand jury? I will put it this way: Do you recall in any conversations at headquarters with the police officials if there was anything said about there would be nothing done against you until you had a chance to present your side of the case?—

A. Yes, sir. Officer Thompson said he would present the matter to the grand jury and I may have an opportunity to go before the grand jury. I said I would not want any opportunity to go before the grand jury. I says, "That is only an inquisitive body." I

says, "They don't pass upon the facts of the case. It is only a probe." I said I would not go before the grand jury.

The government did not cross-examine Tomlinson on this subject, but did in its closing argument comment on it and argue that the defendant's conduct in that instance indicated a consciousness of guilt.

The appellant in his brief (page 35) cites ten cases supposedly on the question of comment by the prosecution on the defendant's failure to take the stand, although only one of them (*Price v. United States*, 14 App. D. C. 391) seems to mention that point. The appellee has no quarrel here with the rule that where a defendant does not take the stand in his own trial, neither his failure to do so nor his failure on a previous occasion to testify at some prior proceeding may be commented upon in that trial.

The appellant then cites five State cases wherein it was held improper for a prosecuting attorney to interrogate about or to comment on defendant's failure to take the stand at a prior proceeding. In all those cases the fact in question was brought out by the prosecution over objection seasonably made. In one of those cases, *Swilley v. State* (73 Tex. Cr. 619) the defendant took the stand at his trial and was asked by the prosecutor whether he had testified at a habeas corpus hearing prior to the trial. This was held to be improper, the Court following an earlier ruling of the same court in

Brown v. State, 57 Tex. Cr. 269, wherein it was held improper for the State to question a defendant on trial as to his failure to take the stand in a previous trial of the same case.

In the cases of *Parrott v. Commonwealth*, 20 Ky. L. R. 761, 47 S. W. 452, and *Newman v. Commonwealth*, 28 Ky. L. R. 81, 88 S. W. 1089, the prosecutor commented to the jury on the failure of the defendants to take the stand in certain previous hearings, although there was no evidence in the case on trial that the defendants had so failed. In the case of *Bunkley v. State*, 77 Miss. 540, 27 So. 638, the defendant's failure to take the stand on a previous hearing was brought out by the State from its own witnesses before the defendant had an opportunity to elect whether he would take the stand in the trial. In the case of *Blackman v. State*, 78 Ga. 592, 3 S. E. 418, also cited by appellant Tomlinson, the comment of the prosecutor which was objected to was on the failure of defendant to use certain witnesses which the prosecutor contended were available, although there was no evidence of that fact.

The federal rule is settled that where a defendant takes the stand he waives all immunity and may be questioned as any other witness. This question was squarely settled in the case of *Raffel v. United States*, 271 U. S. 494, where the Court said at page 499:

The safeguards against self-incrimination are for the benefit of those who do not wish

to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or in any tribunal other than that in which the defendant preserves it by refusing to testify.

In that case the defendant was prosecuted for a violation of the National Prohibition Act and a Prohibition Agent testified against him. The defendant failed to take the stand. The result was a mistrial. On the second trial the defendant elected to take the stand, and was over objection questioned on cross-examination as to why he had not taken the stand in the first trial.

This question had been previously considered with great care in the case of *Diggs and Caminetti*, 220 Fed. 545 (affirmed, 242 U. S. 470, 495). In those cases the defendants took the stand and omitted to explain some of the damaging evidence which the government had introduced against them. The Court commented on this omission. This was assigned as error, but the Court held as did the Supreme Court of the United States later in the *Raffel* case.

DENIAL OF CONTINUANCE FOR PRATT

The appellant Pratt, in addition to adopting, insofar as they are applicable, the points raised by appellant Tomlinson, raises the additional point that the Court below erred in refusing to grant the continuance moved for orally on the day of the trial immediately before the selection of the jury.

Perhaps mention should be made of the fact that the motion for continuance should, by the Rules of Court (Law Rule 44 adopted for the criminal courts by Law Rule 70) be supported by sufficient affidavit disclosing the grounds therefor, unless such affidavit be waived by opposing counsel. No such waiver was requested or given in this case. The ground for the motion for continuance was that the attorney had not had an opportunity to prepare Pratt's defense. No statement was made how long the attorney had represented Pratt nor as to what time would be required nor what things would have to be done in order properly to prepare the defense. For the information of this Court, counsel for appellee state upon recollection that Pratt's attorney was appointed by the Court on the Friday preceding the Monday the case went to trial. For the several months preceding, while the case was pending for trial, Pratt had had another attorney, but when and under what circumstances that attorney had withdrawn is not known.

It is within the discretion of the trial court to grant or refuse a continuance. *United States v. Rosenstein*, 34 Fed. (2d) 630 (C. C. A. 2), Cert.

Den. 280 U. S. 581; *Myers v. United States*, 223 Fed. 919 (C. C. A. 2) Cert. Den. 242 U. S. 627; *McShann v. United States*, 38 Fed. (2d) 635 (C. C. A. 10).

In the case of *Baker v. United States*, 21 Fed. (2d) 903 (C. C. A. 4) Cert. Den. 276 U. S. 621, the defendant was brought on for trial a day after he had been reindicted on the case which had been pending some months. He moved for a continuance on the ground that he had not had opportunity to prepare his defense, but the continuance was refused and this refusal held to be not error, the Court quoting from the case of *Isaacs v. United States*, 159 U. S. 487, as follows:

That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question.

In the case of *Goldsby v. United States*, 160 U. S. 70, it was held not an abuse of the trial court's discretion to refuse a continuance requested the day before the trial on the ground of absence of witnesses.

In the case of *Crono v. United States*, 59 Fed. (2d) 339 (C. C. A. 9) it was held not error to deny a continuance made by counsel who had been substituted for previous counsel for defendant on the Saturday preceding the Tuesday on which the case went to trial.

In the case of *O'Brien v. United States*, 51 Fed. (2d) 193 (C. C. A. 7) a refusal of a continuance on a similar ground was held to be not error.

In the case of *Crouch v. United States*, 298 Fed. 437, the Court stated at page 440:

Error is also alleged on the refusal of the trial judge to grant a continuance because of the absence of the defendant's counsel when the case was called for trial, necessitating defendant's employment of another attorney who happened to be present in court. The defendant and his counsel had each been advised five days in advance when the case would come up for trial. No application for a continuance was made until the case was actually called, when defendant advised the court that his counsel was engaged in another court and asked for a continuance. The court below did not believe a continuance justified. The defendant in fact was represented by counsel, although rather hastily chosen. There appeared, however, to be no real dispute as to the facts. There is no contention now that the record is not adequate or complete. The result would not rightly have been different had counsel originally retained conducted the defense. So far as any questions of law were involved, the defendant's rights were safeguarded by exception duly taken. In the circumstances, we cannot hold that any constitutional right of the defendant was infringed, or find any abuse of discretion by the trial court.

It is not deemed necessary to quote the numerous local cases which follow the universal rule that a motion for continuance is addressed to the sound discretion of the trial court. A local case nearest in point to the instant case is that of *Smith v. United States*, 53 Apps. D. C. 53, wherein a judge of the Police Court, being informed that the defendant's attorney was then actually engaged in the Supreme Court of the District of Columbia, nevertheless, proceeded with the trial, appointing for that purpose an attorney in the court room to represent the defendant. This Court frowned upon the action of the judge, but affirmed the conviction because no prejudice was shown.

CONCLUSION

In conclusion, it is respectfully submitted that no error was committed by the trial court; that facts warranting a conviction went to a jury properly instructed on the law; that the appellants enjoyed in all respects a fair and impartial trial and the convictions ought to be affirmed.

Respectfully submitted.

LESLIE C. GARNETT,
United States Attorney.

SAMUEL F. BEACH,
Assistant United States Attorney.

CHARLES B. MURRAY,
Assistant United States Attorney.

